

LAW OFFICES
WILLIAMS & CONNOLLY LLP

725 TWELFTH STREET, N.W.

WASHINGTON, D. C. 20005-5901

(202) 434-5000

FAX (202) 434-5029

JOSEPH M. TERRY

(202) 434-5320

jterry@wc.com

EDWARD BENNETT WILLIAMS (1920-1988)

PAUL R. CONNOLLY (1922-1978)

July 10, 2018

VIA ECF

Hon. George B. Daniels
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: *Rich et al. v. Fox News Network, LLC et al.*, No. 18-cv-02223, Response to
Plaintiffs' Letter Brief on Motion to Dismiss

Dear Judge Daniels:

At oral argument on the motion to dismiss, Plaintiffs sought, and the Court granted, leave to submit a brief "no longer than five pages" on the limited question of how Defendants could have induced Rod Wheeler to breach a confidentiality clause that he allegedly intended to disregard from the outset. *See* Ex. A, pp. 148–49. Plaintiffs' letter brief neither adheres to the page limit nor answers the question on which they requested supplemental briefing. Plaintiffs instead retread the same ground covered in their response brief.

I. Plaintiffs' Claim for Tortious Interference with Contract Cannot Survive, Because They Allege No Facts that Wheeler Was Induced to Breach His Contract

Plaintiffs' supplement fails to address the central question on which they requested post-hearing briefing: How could Wheeler have been induced to breach a contract that Plaintiffs claim he planned to breach all along? As put by the Court to Plaintiffs' counsel:

THE COURT: You give me a scenario where Wheeler even long before the contract was even entered into signed a contract that he never intended to perform. He didn't not perform this because Zimmerman said, in April of 2017, don't perform this contract that you were getting ready to perform. They knew before the contract was ever signed that he was never going to perform this contract.

* * *

So nothing Zimmerman did after the contract was signed on the facts that you have given me that made Wheeler change his mind and decide, I am not going to perform

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the contract that I otherwise was going to perform if it hadn't been for Zimmerman talking me out of it . . . Your argument on this point is not grounded in law.

Ex. A, pp. 146–47.

The Court's question correctly reflects the law: one cannot be liable for tortious interference where the breaching party needed no inducement to breach the contract and, in fact, never intended to perform. For example, in *Huggins v. Povich*, the court granted the defendants' motion to dismiss a claim for tortious interference with contract, in part because the interviewee, who spoke despite a confidentiality provision, "needed no inducement from defendant to breach the confidentiality agreement. She initiated an all-out media blitz, including local and international newspapers, radio and television with the assistance of a press agent. Her actions were willful and intentional and done with complete and knowing disregard of the confidentiality provision and the Court's restraining order." No. 131164/94, 1996 WL 515498, at *9 (N.Y. Sup. Ct. Apr. 19, 1996).

That conduct is similar to that alleged here: Plaintiffs allege that Wheeler entered into the agreement with the Riches planning to breach the confidentiality provision from the outset, *see* Compl. ¶ 59, Ex. A, p. 132 ("The Court: And Wheeler had already agreed with Zimmerman that he was never going to perform that contract, right? [A]: Right."), and thus had no intention of ever performing. Furthermore, Plaintiffs allege that Wheeler voluntarily talked on camera to a local media outlet about the story, *over the objections of Zimmerman and Fox*, Compl. ¶¶ 75–77, before the publication of the Fox News story at issue. When Plaintiffs themselves allege that Wheeler intended to breach the agreement—and did so independently prior to the Fox News story—they cannot claim that Fox induced the breach. *See RSM Prod. Corp. v. Fridman*, 643 F. Supp. 2d 382, 410 (S.D.N.Y. 2009) ("If a defendant can demonstrate that the third-party was predisposed toward breaching the contract even in the absence of the alleged interference, a plaintiff cannot establish 'but for' causation.")

The case cited by Plaintiffs is not the contrary. In *Antonios A. Alevizopoulos & Assocs., Inc. v. Comcast Int'l Holdings, Inc.*, 100 F. Supp. 2d 178 (S.D.N.Y. 2000), there was no allegation that the allegedly induced party entered into the agreement intending to breach it or breached it independently, but simply that the defendant and the induced party *subsequently* colluded to breach the contract. *Id.* at 186–87. Plaintiffs cite no authority that would support a claim for tortious interference where the breaching party never intended to carry out the contractual obligations.

Plaintiffs completely fail to address another deficiency in their interference claim: the absence of any allegation that Zimmerman or Fox knew that Wheeler did not have authorization from the Rich family to speak with Zimmerman. Because Wheeler's contract permitted him to talk to the media with approval from the family, Compl. ¶ 57, Plaintiffs cannot allege that Zimmerman and Fox intentionally procured a breach absent an allegation that they knew his comments were made without that approval. *See Roche Diagnostics GmbH v. Enzo Biochem, Inc.*, 992 F. Supp. 2d 213, 221 (S.D.N.Y. 2013) ("[I]t is not enough that a defendant engaged in conduct with a third-party that happened to constitute a breach of the third party's contract with the

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plaintiff; instead, the evidence must show that the defendant's objective was to procure such a breach. . . . [A] defendant must specifically intend to interfere with the relevant contract.”).

II. Plaintiffs Failed to Allege Outrageous Conduct

The Fox Defendants argued in their motion that the intentional infliction claim should be dismissed because Fox's reporting did not concern the Plaintiffs and, in the alternative, Plaintiffs failed to allege any extreme or outrageous conduct. Plaintiffs attack that alternative argument on the ground that outrageousness is a “fact-intensive” question that cannot be decided “before a page of discovery has been turned over.” Supp. Br. 1. Not so. “Whether the alleged conduct is sufficiently outrageous to satisfy the first element is a matter of law for the courts to decide.” *Thai v. Cayre Group*, 726 F. Supp. 2d 323, 331 (S.D.N.Y. 2010); *Nevin v. Citibank, N.A.*, 107 F. Supp. 2d 333, 345–46 (S.D.N.Y. 2000) (same). As a matter of law, Plaintiffs' allegations fail to satisfy New York's stringent standard for such a claim.

Plaintiffs assert that they have sufficiently pled outrageousness because “the complaint alleges a *campaign* of harassment by Defendants.” Supp. Br. 3. But this supposed campaign consisted of allegedly planting Wheeler with the Rich family in order to serve as Fox's source for *a single news story*—a story that Fox updated hours after publication to reflect that the Rich family repudiated Wheeler's remarks. This conduct falls far short of the sustained, malicious conduct necessary to satisfy New York's stringent outrageousness standard. *Cf. Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 161 (2d Cir. 2014) (upholding intentional infliction claim where defendant permitted “hate-ridden and menacing environment to persist for more than three years”).

Indeed, the timeline that Plaintiffs distributed at oral argument makes plain that neither Fox nor its reporter, Malia Zimmerman, engaged in any campaign of harassment. The sum total of Zimmerman's alleged conduct included: emailing Joel Rich seeking information that would “bring further attention” to his son's case; meeting in person with Wheeler and Butowsky *one time*; exchanging emails with Wheeler and Butowsky about the police investigation into Seth Rich's murder; emailing Wheeler to tell him publication was imminent and that Fox producers in New York would not be pleased he gave the story to a local Fox affiliate; and telling Joel Rich that much of the information in Fox's article came from Wheeler. This conduct, consisting almost entirely of garden-variety newsgathering activity and involving only limited contact with the Plaintiffs, hardly amounts to a “campaign” to harass Joel and Mary Rich.

Plaintiffs also now argue that Defendants' outrageous conduct included “trick[ing]” them “into hiring an investigator *with the goal of aborting the legitimate investigation of their son's murder.*” Supp. Br. 4 (emphasis added). That assertion is preposterous. Their complaint nowhere alleges that Fox in any way tricked the Plaintiffs,¹ much less that any defendant either intended to

¹ Plaintiffs allege instead that *Butowsky* persuaded them to hire Wheeler, but they can hardly contend that Butowsky “tricked” them, Supp. Br. 4, when he told them *before they hired Wheeler* that he had reason to believe Seth Rich had passed DNC emails to Wikileaks. Compl. ¶¶ 26, 31.

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or did impede the police investigation into their son's murder. Not a single allegation in the complaint suggests that law enforcement agencies were affected one way or the other by Fox's reporting—much less that this was Fox's intent. Indeed, the Complaint alleges that law enforcement believed that Mr. Rich was murdered in a botched robbery and were not swayed by Mr. Wheeler's views. Compl. ¶¶ 2, 17, 21, 96–97, 102.

Plaintiffs rely principally on a case from the Northern District of Alabama, *Holloway v. American Media, Inc.*, 947 F. Supp. 2d 1252 (N.D. Ala. 2013), involving circumstances not present here. In that case, a magistrate judge held that a plaintiff could state a claim for intentional infliction only if the speech at issue was “motivated by a *specific intent* to cause emotional harm to a particular person.” *Id.* at 1263 (emphasis added). The magistrate allowed the claim to proceed because plaintiff had plausibly alleged that she had “a pre-existing relationship” with the *National Enquirer*, such that “the newspaper articles at issue were . . . motivated by some desire to attack her or cause her pain.” *Id.* at 1262; *see also id.* at 1264 n.18. Plaintiffs argue that they had a relationship with Fox News, but that developed in the course of reporting the article at issue in this case. Supp. Br. 4. Unlike in *Holloway*, there is no allegation here the Fox had a *preexisting* relationship with the Rich family that drove the reporting in the first place with a specific intent to cause them harm.²

Plaintiffs next rely on *164 Mulberry Street Corp. v. Columbia University*, 771 N.Y.S.2d 16 (App. Div. 2004), in which the court permitted plaintiff restaurant owners to bring an intentional infliction claim against a university professor who had sent them letters falsely claiming his wife had suffered food poisoning in order to document the restaurants' response for an academic study. That case is distinguishable, because the court there found that the professor had waged a “campaign” that resulted in “financial crisis” for numerous restaurants, which had to destroy thousands of dollars' worth of food and subject their employees to intrusive stool sampling in response to defendant's letters. This case involves no such campaign—much less one that subjected Plaintiffs to the ruinous financial loss or humiliating physical invasions at issue in *Mulberry*. Notably, *164 Mulberry* preceded the Supreme Court's decision in *Snyder v. Phelps*, 562 U.S. 443, 458 (2011), which held that speech on a matter of public concern cannot satisfy the outrageousness standard as a matter of law.

² The magistrate judge in *Holloway* separately erred in holding that the “of and concerning” requirement does not apply to speech-based IIED claims. The court reasoned that, because the tort arose out of law involving improper burial or mishandling of corpses, those claims by their very nature could be brought by surviving family. *Id.* at 1264. Of course the First Amendment's “of and concerning” requirement would not apply in improper burial cases because *they do not involve speech*. The Fox Defendants are aware of no other case suggesting that this constitutionally imposed limit does not apply in speech-based intentional infliction cases.

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Finally, plaintiffs point to the section of Justice Breyer's concurring opinion in *Snyder*, where he concluded that the state is not "powerless" to protect individuals in the hypothetical situation "where A (in order to draw attention to his views on a public matter) might launch a verbal assault upon B, *a private person*, publicly revealing the most intimate details of B's *private life*." 562 U.S. at 462 (emphasis added). Justice Breyer's hypothetical served to highlight the difference between speech on matters of public concern—which "is entitled to special protection," *id.* at 452—and speech on matters of private concern, which can more readily be regulated by the state. That hypothetical does little to advance Plaintiffs' case because the speech at issue here indisputably addresses a matter of public concern.

III. Concerted Action Claims

Plaintiffs contend that they can maintain their concerted action claims without showing that any defendant engaged in acts that were independently tortious; they argue instead that the conduct of all defendants *in the aggregate* may give rise to an intentional infliction claim. Supp. Br. 5–6. New York courts have specifically rejected this position, holding that conspiracy and aiding and abetting liability both require "tortious conduct by each defendant." *Pittman by Pittman v. Grayson*, 149 F.3d 111, 122 (2d Cir. 1998).

Both the aiding and abetting and conspiracy claims also fail because Plaintiffs failed to plead the requisite intent. Contrary to Plaintiffs' assertion, Fox plainly *did* argue that Plaintiffs failed to plead the *separate* intent element of their conspiracy and aiding and abetting claims. Fox Br. 19. It is not enough to say that the Defendants agreed to publish the article and they did so with reckless indifference to the effect on the Rich family. Both the conspiracy and aiding and abetting counts require allegations of a "*specific intent*" to commit the underlying tort. *Singh v. NYCTL 2009-A Trust*, No. 14 Civ. 2558, 2016 WL 3962009, at *10 (S.D.N.Y. July 10, 2016) (emphasis added); *see also Grayson*, 149 F.3d at 123 ("In order to be liable for acting in concert with the primary tortfeasor under either theory, the defendant must know the wrongful nature of the primary actor's conduct."); *In re Food Mgmt. Group, LLC*, 380 B.R. 677, 704 (Bankr. S.D.N.Y. 2008) ("Under New York law, malice and intent . . . to injure the plaintiff are essential elements in conspiracy actions."). Not a single allegation in this complaint would permit the Court to conclude that Fox published its article with the *specific intent* of inflicting emotional harm on the Plaintiffs. Plaintiff's own allegation that they are "*collateral damage* in a political war to which they are *innocent bystanders*," Compl. ¶ 1 (emphasis added), defeats their conspiracy and aiding abetting claims as a matter of law.

Respectfully submitted,

s/ Joseph M. Terry

Joseph M. Terry (*pro hac vice*)

Counsel for Fox News Network, LLC

With Consent,

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DECHERT LLP
David H. Stern (*pro hac vice*)
Counsel for Malia Zimmerman

cc: Counsel of Record (via ECF)

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
JOEL RICH and MARY RICH,

Plaintiffs,

v.

18 Civ. 2223 (GBD)

FOX NEWS NETWORK LLC, MALIA
ZIMMERMAN, and ED BUTOWSKY,

Oral Argument

Defendants.
-----x

New York, N.Y.
June 20, 2018
10:30 a.m.

Before:

HON. GEORGE B. DANIELS,

District Judge

APPEARANCES

MASSEY & GAIL LLP

Attorneys for Plaintiffs

BY: LEONARD A. GAIL

SUYASH AGRAWAL

ELI KAY-OLIPHANT

-and-

SUSMAN GODFREY LLP

BY: ARUN SUBRAMANIAN

ELISHA B. BARRON

WILLIAMS & CONNOLLY LLP

Attorneys for Defendant Fox News Network LLC

BY: JOSEPH M. TERRY

KEVIN T. BAINE

KATHERINE A. PETTI

DECHERT LLP

Attorneys for Defendant Malia Zimmerman

BY: DAVID H. STERN

SPIRO HARRISON

Attorneys for Defendant Ed Butowsky

BY: DAVID B. HARRISON

KATHERINE M. WYMAN

1 (Case called)

2 MS. GAIL: Hello, your Honor, Lenny Gail, along with
3 Suyash Agrawal and Eli Kay-Oliphant of Massey & Gail. Our
4 colleagues will introduce themselves. We are also joined by
5 the plaintiffs, Joel and Mary Rich.

6 MR. SUBRAMANIAN: Good morning, your Honor. For the
7 plaintiffs, Mary and Joel Rich, from Susman Godfrey, Arun
8 Subramanian, and I'm joined here with my colleague, Elisha
9 Barron.

10 THE COURT: Good morning.

11 MR. TERRY: Good morning, your Honor, Joe Terry with
12 Williams & Connolly for defendant Fox News.

13 THE COURT: Good morning, Mr. Terry.

14 MR. BAINE: Good morning, your Honor, Kevin Baine,
15 also for defendant Fox News.

16 THE COURT: Good morning, Mr. Baine.

17 MS. PETTI: Good morning, your Honor, Katherine Petti,
18 also from Williams & Connolly, also on behalf of Fox News.

19 MR. STERN: Good morning, your Honor, David Stern,
20 Dechert, on behalf of Malia Zimmerman, with my colleague,
21 Katherine Wyman.

22 MR. HARRISON: Good morning, your Honor, David
23 Harrison from Spiro Harrison on behalf of defendant Ed
24 Butowsky.

25 THE COURT: Who wants to be heard first from the

1 defense on the motion?

2 MR. TERRY: Your Honor, that would be me on behalf of
3 Fox.

4 THE COURT: Yes.

5 MR. TERRY: Would you prefer I argue from here?

6 THE COURT: Probably be easier from the podium.

7 MR. TERRY: Your Honor, plaintiffs' claim for
8 intentional infliction of emotional distress, no matter how
9 styled, is, at its core, a claim for defamation. We know that
10 because of what the plaintiffs themselves have said. They have
11 described a scheme to smear Joel and Mary Rich's dead son.
12 They contend that, quote, the scurrilous allegations about
13 their son and his murder were causing them severe emotional
14 harm, and they allege that they are distraught not only because
15 their son has been killed, but also because his good name and
16 reputation have been irrevocably harmed. No matter what they
17 call their claim, their claim is, in essence, a claim for
18 defamation. And no matter how deep their pain is as parents,
19 the law says that they cannot state a claim for the defamation
20 of their son.

21 Courts uniformly have rejected defamation claims
22 arising from statements made about another, living or dead, and
23 courts recognize that family members may suffer significant
24 emotional harm from defamatory statements made about their
25 relatives, yet still there is no cause of action for

defamation.

For that same reason courts in New York and throughout the country have held that an intentional infliction of emotional distress claim cannot be brought based on statements made about another, even if you suffer or allege to have suffered emotional harm as a result. That's made clear in the appellate division's decision in the *Sylvester* case. It's made clear in this Court's decision in the *Asaro v. Connamas* case, and it's clear in a case very much like this one, the *Flynn* case in California, where the survivors brought a case based on the alleged defamation of their father that they claimed gave them emotional injury and defamed their father's name. The Court in all of those cases dismissed both defamation claims and intentional infliction of emotional distress claims.

And the reason for that limitation is based partially on hundreds of years of development of the common law of defamation and intentional infliction, but also because of a constitutional requirement. The Supreme Court said in *New York Times v. Sullivan* that the Constitution requires for a defamation claim to proceed that it be of and concerning the plaintiff. That's not just a common law requirement; that is a constitutional requirement.

For that reason courts, including this Court, have held that intentional infliction claims are constitutionally barred where they are based on statements made about another.

1 And that's made clear in the *Diaz* case, *Diaz v. NBC Universal*.
2 Judge McMahon first dismissed the defamation claim on the
3 grounds that it was not of and concerning the plaintiff, and
4 then proceeded to dismiss the intentional infliction claim
5 saying, you cannot use an intentional infliction claim to plead
6 defamation where it is not of and concerning it. And the Court
7 did that based on the Supreme Court's decision in *Hustler* which
8 said, again, you cannot base an intentional infliction of
9 emotional distress claim where you have not met the
10 constitutional requirements for a defamation claim.

11 In *Hustler*, it was a failure to allege actual malice.
12 In *Diaz*, it was the same failure here, the failure to allege
13 that the defamatory statements were of and concerning the
14 plaintiff, and that is an absolute bar to this claim.

15 The statements at issue, even by the plaintiffs' own
16 description, are with the plaintiffs' son, not about them, and
17 there is no cause of action for an intentional infliction or
18 defamation based on that. This limitation makes sense because
19 defamation is a narrow exception to what is otherwise
20 uninhibited free speech, and it's a carefully crafted exception
21 with a number of requirements the Supreme Court has spent at
22 least five decades honing. One of those requirements is that
23 it be of and concerning, and failure of the statements to be of
24 and concerning Joel and Mary Rich mean that they cannot, under
25 the Constitution, bring a claim.

1 The intentional infliction claims also fails because
2 it fails to satisfy New York stringent common law requirements
3 for such a claim. The New York Court of Appeals, in the *Howell*
4 case, explained that this tort is disfavored among torts and
5 that the showing is incredibly high. Liability, the Court
6 said, has only been found where the conduct has been so
7 outrageous in character and so extreme in degree to go beyond
8 all possible bounds of decency and to be regarded as atrocious
9 and utterly intolerable in civilized society. The appellate
10 division in the *Doe* case said, you need to show a campaign of
11 harassment and intimidation. So in the *Doe* case the Court
12 found that there could be no cause of action for intentional
13 infliction of emotional distress where the allegation was that
14 rape victims were lied to about whether or not their identities
15 would be concealed on television broadcasts. They were lied to
16 repeatedly about that. Their identities were shown and they
17 claimed emotional harm. The Court said, that is not enough to
18 satisfy this tort because there was no campaign of harassment
19 and intimidation.

20 THE COURT: How do you characterize what statement is
21 at issue and how do you characterize what conduct is at issue?

22 MR. TERRY: The core of the plaintiffs' case is the
23 statements made about Seth Rich. They have no complete tort
24 without that statement.

25 THE COURT: Which statement?

1 MR. TERRY: It was the statement in the article that a
2 federal investigator revealed that Seth Rich had exchanged
3 e-mails with WikiLeaks, and I believe also the statement by Rod
4 Wheeler that he believed there was a connection between Seth
5 Rich and WikiLeaks and that the secret of solving the case lies
6 on his computer.

7 I believe they also allege that Rod Wheeler's
8 statement that was not published by Fox News, but by a local
9 affiliate, Fox 5, a different company, the night before, where
10 he said it's confirmed that a federal source has said that Seth
11 Rich communicated with WikiLeaks, that is the crux of their
12 claim, that we falsely alleged through the statements of
13 Wheeler and the statement regarding the federal investigator
14 that Seth Rich had in fact communicated with WikiLeaks and was
15 the source of certain DNC e-mails to WikiLeaks.

16 THE COURT: What do you claim is the conduct that's at
17 issue?

18 MR. TERRY: The conduct that they allege is at issue
19 is the publication. They claim a host of conduct by
20 Mr. Butowsky, Tweets and various things. They appear to
21 allege --

22 THE COURT: When you say Tweets and various things, I
23 understand what you mean by the publication of the article, I
24 understand that. What else --

25 MR. TERRY: As for Mr. Butowsky, they allege that he

1 had direct communications with Joel and Mary Rich after the
2 story ran, which inflicted emotional distress.

3 THE COURT: Again, you said they had direct
4 communication. That statement doesn't tell me anything about
5 the nature of the conversation.

6 MR. TERRY: Sorry. I believe the direct statement he
7 is alleged to have made to the Riches is that Malia Zimmerman
8 has information about who owned the gun that was killed to use
9 your son. You should contact Malia Zimmerman. She has
10 information for you. That's one of the statements attributed
11 not to Fox directly, but to Ed Butowsky.

12 As for Fox, the only conduct that we are alleged to
13 have directly engaged in is publishing the article, asking
14 Mr. Wheeler to provide us with information, which they allege
15 tortiously interfered with the confidentiality provision of the
16 employment contract. They allege that Malia Zimmerman gave
17 Mr. Wheeler information in advance of his meeting with a D.C.
18 detective. They don't describe what that information is, but
19 they allege that that is somehow wrongful to have prepared them
20 for a meeting with a D.C. Police Department detective, and they
21 allege that she was aware that Ed Butowsky had made false
22 representations about the nature of his interest in the case.

23 They allege that he wasn't motivated by sympathy. He
24 was motivated by a desire to establish some sort of political
25 agenda, and I believe they allege that Malia Zimmerman should

1 have known that Rod Wheeler was going to provide information to
2 her and that he had entered into a contract that precluded him
3 from doing that without the authorization of the Riches.

4 THE COURT: You are conflating two different claims.
5 I was specifically asking about the intentional infliction of
6 emotional distress. When you were discussing the requirement
7 of outrageous conduct, I am trying to understand what you say
8 that the allegations in the complaint are that they claim is
9 supposed to satisfy the definition of outrageous conduct.

10 MR. TERRY: Yes. I believe that that is the conduct
11 that they actually allege, that she met with Wheeler and
12 Butowsky. That's the first direct allegation about Fox.

13 THE COURT: Again, the way you say it doesn't advance
14 my consideration. The fact that somebody meets with somebody
15 is not a definition of outrageous conduct. So if they met at
16 Starbucks, no one is going to say in the abstract that that's
17 outrageous conduct.

18 MR. TERRY: I couldn't agree more. The allegation is
19 that they met and that this was part of their scheme to put
20 together a false story implicating Seth Rich. But the actual
21 conduct that's alleged is that she met with Butowsky and
22 Wheeler. That's the first thing.

23 The second thing is that she fed Wheeler information
24 before he met with the police department. They don't allege
25 that she gave him false information before he met with the

1 police. They don't allege that feeding information to him
2 before he met with the police is tortious or that it's anything
3 other than a reporter attempting to get more information from a
4 source. Here, where Rod Wheeler was meeting with a police
5 detective, it seems like a pretty good way to get pretty good
6 information about what the D.C. Police did.

7 THE COURT: The nature of the relationship is a little
8 different than the standard relationship of a reporter trying
9 to get information from a source. Their allegation is, and I
10 am not sure you dispute it, that there was already a
11 relationship and connection between Wheeler, Zimmerman, Fox
12 News, Butowsky before this even began. It's not as if she is
13 going out there trying to find sources. They are claiming that
14 this relationship was established even before Wheeler met the
15 Riches.

16 MR. TERRY: They don't allege and I don't believe it
17 would be accurate to say that Zimmerman and Wheeler had any
18 relationship prior to the first meeting they described in their
19 complaint. Wheeler's relationship was with Fox News as an
20 occasional paid contributor. He would come on and talk about
21 current events and be paid.

22 THE COURT: That's more than that. Wheeler's
23 relationship was with Fox News. Butowsky arranged to have
24 Wheeler work for the Riches and in fact was paying Wheeler, and
25 Zimmerman was a reporter for Fox News who is obviously going to

1 write the story and was going to write the story unless you
2 tell me she was ignorant of what Butowsky and what Fox News was
3 doing with regard to the story and is off on her own, that she
4 was totally aware that Butowsky had set up Wheeler to represent
5 the Riches, was paying Wheeler to represent the Riches, and the
6 purpose of that would ultimately be to benefit a story that she
7 was going to write for Fox News.

8 MR. TERRY: I don't believe they directly allege that
9 she knew that Butowsky was paying for Wheeler --

10 THE COURT: Is that in any way in dispute?

11 MR. TERRY: It's not relevant for the purposes of this
12 motion, whether it's accurate or not.

13 THE COURT: For her to have some liability with regard
14 to some of the activities, if not most of the activities that
15 we were just discussing, she would have to be aware and
16 participate. Whether or not it constitutes an aiding and
17 abetting claim or a conspiracy claim or just an independent
18 claim itself, they have got to connect her. She can't just be
19 a reporter who walks off the street and decides that she later
20 found out that there was some guy who was hired by the Riches,
21 and she just happened to find that out the way all the other
22 reporters found out, and she decided she wanted to go interview
23 the guy. That's not what happened.

24 MR. TERRY: That's correct. Ms. Zimmerman wrote her
25 first article about Seth Rich in January, significantly before

1 she interacted with Mr. Wheeler. Subsequently, we don't
2 dispute that Mr. Butowsky introduced her to Mr. Wheeler, and
3 Mr. Wheeler became a source for the story.

4 THE COURT: And everybody knew that. At the time
5 there is no reason to believe that everyone wasn't aware that
6 Butowsky was going to pay Wheeler to do an investigation for
7 the Riches and that the result of that relationship and that
8 work would be an article that was generated for Fox News by
9 Zimmerman.

10 MR. TERRY: There is no question that Zimmerman's hope
11 was that her interactions with Butowsky and Wheeler would
12 assist her in writing an article about the --

13 THE COURT: It was more than a hope. That was
14 everyone's intent.

15 MR. TERRY: That is certainly why she was meeting with
16 Wheeler.

17 THE COURT: I'm asking. I don't know if it's relevant
18 or not. But from my understanding of the circumstances that
19 are alleged and not denied is that that was her intent. She
20 didn't just wish it. They all planned it that way, right?
21 That doesn't necessarily make out a claim, but we are not
22 talking about a situation where she was hoping that was going
23 to happen; everybody planned it that way.

24 MR. TERRY: It was certainly her plan to use Wheeler
25 as a source for the story.

1 THE COURT: That plan was accompanied by knowledge
2 that Butowsky was going to pay Wheeler to be an investigator
3 for the Riches and the results of that investigation were going
4 to be a significant part of her source for the article.

5 MR. TERRY: Plaintiffs will correct me if I'm wrong,
6 but I don't believe they allege directly that Zimmerman knew
7 that Butowsky was paying for Wheeler's work for the Riches as
8 opposed to serving as a conduit between her and Wheeler, and I
9 don't know. It's something I have not focused on because it's
10 not relevant to the outcome of any of the claims.

11 When you talk about what conduct is at issue by Fox
12 and what could possibly be described as outrageous, the only
13 things that they identified that was actual conduct by Fox or
14 its reporter is the publication of the story, giving Wheeler
15 information, they don't describe what or say that it's false,
16 before he met with the detective, meeting initially with
17 Butowsky and Wheeler, allegedly for the purpose of creating a
18 story where they would defame Seth Rich, but that's it. None
19 of that conduct comes close to meeting the standard in New York
20 for intentional infliction of emotional distress.

21 In particular, there is a case *Balderman*, which is a
22 New York Appellate Division case, I believe, from the Fourth
23 Department, which explains that even tricking somebody into
24 appearing on television, deceptively editing their statements
25 to make it appear that they said things that portrayed them in

1 a poor light when they didn't, isn't enough to state a claim
2 for intentional infliction.

3 Notably, they cite no cases in New York at all since
4 the *Howell* decision that permitted any intentional infliction
5 claims to proceed based on conduct anywhere close to this. No
6 New York claims based on any news gathering since *Howell*, no
7 cases based on anything close to the type of allegations at
8 issue here.

9 There is also a constitutional bar to the suggestion
10 that the publication of the story about Seth Rich was itself
11 outrageous. There is no dispute that the story was about a
12 matter of public concern. It was about who leaked e-mails to
13 WikiLeaks that became an important issue in the election and
14 the question of Russian interference and everything that's
15 happened since. The murder of Seth Rich was a high-profile
16 issue in Washington, D.C. and around the world as soon as it
17 happened. They don't dispute that it was not a matter of
18 public concern.

19 The Supreme Court's decision in *Snyder* makes clear
20 that commentary on an issue of public concern cannot be called
21 outrageous as a matter of law, and the reason for that is
22 because outrageousness, as it applies to an intentional
23 infliction of emotional distress claim is so incredibly
24 subjective and so incredibly vague.

25 And speech on a matter of public concern, the Supreme

1 Court said in *Snyder* is the most protected type of speech. It
 2 is the heart of the First Amendment. It deserves the highest
 3 tier of protection. And because of that, even incredibly
 4 hurtful speech cannot be labeled as outrageous, and the danger
 5 the Court pointed out is that when you allow outrage to be the
 6 standard that the jury used to decide something, you are
 7 inviting viewpoint discrimination. You are inviting the jury
 8 to say that the message made by the article is itself
 9 outrageous and that invites discrimination.

10 The complaint itself or the way it frames this case,
 11 it describes exactly what could happen. The complaint in many
 12 parts is an attack on the institution of Fox News or the
 13 political point of view they ascribe to.

14 THE COURT: You are absolutely right. The political
 15 point of view can't be the issue. But clearly the statute does
 16 not intend to protect. It protects commentary and reporting on
 17 issues of public concern, but it wouldn't protect just making
 18 up a story, a false story.

19 MR. TERRY: I think there are two answers to that.
 20 The first is that the tort of outrage, which is what an
 21 intentional infliction tort used to be called, is an improper
 22 tool to try to remedy that. If you make a false statement
 23 about somebody, there is a cause of action for it for
 24 defamation.

25 THE COURT: You already said there is not a cause of

1 action for defamation because it is not made about them.

2 MR. TERRY: That's exactly right.

3 THE COURT: You can't have it both ways. You can't
4 say, we apply the defamation standard, but at the same time
5 say, this is not a defamation case because it doesn't meet the
6 definition of defamation because it's not about that.

7 MR. TERRY: Defamation is itself, as I said, a narrow
8 exception to what is otherwise uninhibited speech.

9 THE COURT: In what way would defamation apply to this
10 circumstance? In what way would the rules about defamation
11 apply to this circumstance when it doesn't even meet the
12 elements of that?

13 MR. TERRY: In this case there is no defamation claim.
14 To answer your broader question, what is the protection against
15 false statements on issues of public concern? The answer to
16 that is defamation.

17 THE COURT: The answer is not defamation if it's about
18 somebody else.

19 MR. TERRY: That's right. And the reason why there is
20 no remedy for that is because defamation is the result of a
21 judicial balance between the private interest in protecting
22 your reputation versus the public interest in having free and
23 uninhibited speech. That's the essential balance in all of
24 these cases.

25 When there is no damage to a living person's

reputation, that interest is diminished and the same level of protection doesn't apply to that private interest, so the balance has been shifted. This is actually reflected in some of the cases that they rely on, that they permit the tort of intentional infliction to proceed based on speech-based claims. There is a case about Howard Stern and his radio show. There is another case about another shock jock who had an ugliest bride competition on television. And the Court said here there are very significant private interests and no countervailing public interest because they are not on issues of public concern.

That balance is flipped here. You don't have the same private interest because you don't have the particularized interest of a living person in defending their reputation, which is why the defamation claim exists as a carve-out as to what is otherwise free speech.

When that balance is changed, the answer is, there is not a remedy through an intentional infliction claim. And the danger is, if you were to allow these intentional infliction claims to proceed, it would be inviting the jury to make decisions about outrage based on their own political point of views.

You can even see it in the briefing. The viewpoint as to whether or not leaking, and leaking in this particular instance makes you a hero nor a villain, depends on your

1 political point of view. Whether or not people would look to
2 the article and conclusion that Seth Rich leaked information to
3 WikiLeaks and view that as outrageous, depends on their
4 preexisting political views, whether republican or democrats,
5 Sanders or Clinton, all of those things.

6 THE COURT: That's not necessarily so because if you
7 made up a story about an individual and made what at least the
8 plaintiff would claim is an outrageous lie, it doesn't
9 necessarily -- in many circumstances, even ones similar to
10 this, where one can analyze whether or not what you did was
11 outrageous, regardless of what your political feelings were.

12 Whether you are conservative or liberal or democrat or
13 republican, no one would want someone to come to you and walk
14 into this courtroom and say to you, you know what, your mother
15 just died. And then you run out and you called home and no,
16 that wasn't true, and they just did it to hurt you. One may
17 disagree about whether or not that is or isn't outrageous
18 conduct that would merit intentional infliction of emotional
19 distress, but a jury could analyze that, regardless of what
20 their political feelings are.

21 MR. TERRY: That's exactly right and that's why this
22 doesn't apply to matters of private concern. That is a private
23 concern, like your example. You don't have that same type of
24 risk.

25 Here, it's indisputably a matter of massive public

concern and that risk exists. And the line is not drawn in a way because there might be instances in which jurors' biases would not be used to stifle speech. It's designed to protect speech and to prevent against the possibility that there are situations where the jurors' preexisting political beliefs will be what guides their judgment and outrage.

Because the tort of outrage is so inherently subjective and creates that risk, when you are talking about matters of public concern, the tort cannot apply. In your example it clearly can because it's a matter of private concern and the private public balance is shifted. Again, here, it's the complete opposite.

THE COURT: That's why I'm trying to understand from your perspective, in terms of your argument, whether you are characterizing the outrageous conduct at issue as the content of the article or the activities of the individuals.

MR. TERRY: Your Honor, their complaint alleges that it is both. Their injury that they allege flows solely from the article. They articulate in great deal about how they were injured by the effect on the reputation of their son and the public inquiries that had started. They don't articulate any injury whatsoever that comes from the other activity aside from publication.

The only complete tort they can allege requires a focus on the publication and what it said about Seth Rich. If

they want to amend their complaint and try to pass a motion to dismiss just based on the claims about the conduct and not based on the publication, they could try to do that. It would not come close to the level of conduct that New York courts require for the tort of intentional infliction of emotional distress, but they could try it.

What they cannot do is take the content of the broadcast or the content of the report, particularly because it's a matter of public concern, and use it as a basis for their intentional infliction claim.

I think whether or not you look to the constitutional limit or even the allegations itself, there is absolutely no basis to shoehorn this case into an intentional infliction of emotional distress claim.

If you look at the New York court cases that have found conduct that constituted intentional infliction of emotional distress, it is far greater than anything that is alleged here, and there is a completely different balance of private and public interests.

I think it is notable in their briefs, when they talk about the low standard that is required to show this type of claim and the different cases where courts have found lesser conduct to constitute intentional infliction of emotional distress, those cases all predated the New York Court of Appeals decision in *Howell*. And the Southern District

subsequently said, they are no longer good law on the matter because they don't reflect the heightened standard of *Howell*.

Here you have a tort that is disfavored as a matter of common law in New York. It's an incredibly high burden to meet and significant constitutional impediments for proceeding. It should be dismissed. Their claim is essentially a defamation claim. They have no defamation claim and for that same reason they have no intentional infliction claim, whether because it is not of and concerning the plaintiffs or because the conduct alleged itself is not outrageous.

Unless you have more questions about that, I'll turn to tortious interference, unless you want to hear argument completely on the first claim.

THE COURT: No. Go ahead.

MR. TERRY: The tortious interference claim fails for two pretty clear reasons that are distinct.

The first is that the complaint doesn't actually allege that Malia Zimmerman knew that Rod Wheeler did not have authorization to talk to her. The contract at issue, which they allege that she read, said that Rod Wheeler can't talk to the press unless he gets authorization from the Rich family.

They don't allege that Rod Wheeler ever told her that he didn't have authorization to talk to her. They allege that Malia Zimmerman presented the Rich family or called the Rich family and asked for a comment on her story.

1 They don't allege that the Rich family ever called her
2 back to say, are you talking to Rod Wheeler? You shouldn't be
3 talking to Rod Wheeler. There is not even a boilerplate
4 allegation that she knew that the Rich family hadn't provided
5 authorization to talk to her.

6 If she didn't know that Rod Wheeler didn't have
7 authorization to talk to her, there simply can't be a tortious
8 interference claim. It's a critical element and it's
9 completely missing from the complaint. Even in their
10 opposition they don't attempt to articulate any allegations
11 showing Zimmerman knew that Rod Wheeler didn't have
12 authorization to talk to her.

13 Even if she did, even if she did know that Rod Wheeler
14 was bound by a confidentiality agreement, that can't state a
15 claim for tortious interference for two reasons.

16 First of all, New York courts have repeatedly said
17 that a claim even for interference with an existing contract
18 requires a showing that the sole purpose of the interference
19 was to cause the damage and that it was done through wrongful
20 means. There is no allegation that the sole purpose of her
21 conduct was to harm the Riches.

22 To the contrary. The complaint makes clear that the
23 sole purpose was to create a new story.

24 There is also no allegation that it was done through
25 wrongful means. No allegation that she induced Rod Wheeler

1 through wrongful means to breach his contract. It alleges that
2 she simply asked him for the information, and he provided it to
3 her.

4 The plaintiff's case had a different test to apply
5 instead of sole purpose, that they simply need to show that
6 Malia Zimmerman acted without justification in getting Rod
7 Wheeler to provide her with that information. But they can't
8 even meet that test.

9 The justification for getting Rod Wheeler to provide
10 information about his work is that he was the detective who had
11 been given the job to try to find out what happened with Seth
12 Rich. Getting information from him, whatever it was, was
13 valuable, particularly given how significant of a public topic
14 this was. To suggest that a reporter could be liable for
15 tortious interference simply for asking a source for
16 information, when they might be bound by a confidentiality
17 agreement, would eliminate entire categories of news gathering.

18 If that were the case, we would never know about all
19 kinds of purported malfeasance because employees are bound by
20 confidential agreements all the time. There have been all
21 these things in the news lately about sexual harassment, Harvey
22 Weinstein, all kinds of other cases. All of those people had
23 settlements that had confidentiality provisions.

24 The reporters are not liable for tortious interference
25 for getting those sources to talk to them despite those

1 confidentiality provisions. People in the White House have
2 confidentiality provisions. Sources still talk to them to get
3 information.

4 Those leaks are not a cause of action for tortious
5 interference and no case that plaintiffs cite or that we are
6 aware of has imposed liability for that. Quite to the
7 contrary, we cite the *Huggins v. Povich* case where Povich knew
8 that Huggins was bound by a confidentiality agreement;
9 nevertheless, induced her to breach it on his show. It was a
10 matter of substantially less public concern and the Court said
11 that is not without justification. It's not without
12 justification to get somebody to provide you with information
13 that they have when you're a journalist, regardless of the
14 significance of it.

15 Here, where you have a highly significant public
16 matter, asking Rod Wheeler to provide the information that he
17 had is not the type of wrongful conduct that can give rise to a
18 tortious interference claim.

19 You had asked me earlier about vicarious liability, or
20 at least alluded to it to some extent, and to what extent can
21 Fox be vicariously liable for the conduct of Butowsky and
22 Wheeler. The answer is they can't, and they can't because the
23 test for vicarious liability is about control, whether or not
24 they had control over the methods, means, or if it was
25 permitted by Butowsky and Wheeler. There are no allegations in

1 the complaint that come even close to establishing that Fox had
2 control over those two people.

3 THE COURT: At least on the surface, superficially,
4 one would argue that Butowsky and Zimmerman were doing Fox's
5 bidding. It's not like they were independent of Fox.

6 MR. TERRY: There is no allegation that Butowsky was
7 acting because Fox asked him.

8 THE COURT: Butowsky wasn't acting in his own
9 interest. He was acting on behalf of uncovering a story for
10 Fox News. He didn't have a personal interest in this.

11 MR. TERRY: I believe he did. He had an independent
12 interest in doing this.

13 THE COURT: To do what with Wheeler's conclusions?
14 Wasn't it pretty clear that the intent was that it was going to
15 be publicized at some point through Fox News?

16 MR. TERRY: You have to ask Mr. Butowsky's counsel,
17 but I believe the intent was to find out what happened and,
18 perhaps, to prove that Seth Rich in fact did communicate with
19 WikiLeaks, but to find out what happened. And then to
20 disseminate the facts about what happened through media
21 platforms which could be Fox.

22 THE COURT: It's difficult for me to characterize
23 Butowsky, Zimmerman, and Fox News as strangers --

24 MR. TERRY: I would agree with that.

25 THE COURT: -- from the beginning of this, and I don't

know what the nature of the relationships were. But clearly on the surface it doesn't lend itself to an assumption that Butowsky just got up, woke up one day, decided he wanted to hire an investigator for the Riches, did so, then some reporter knocked on his door, or Wheeler's door, who had no relationship or knowledge about that relationship, and decided that they wanted to do a story and then decided that the story was going to be passed onto Fox News, who she didn't have a relationship with.

This was a lot more of a cozy relationship between anybody rather than a stranger relationship.

MR. TERRY: I agree with you that if the test was, are they strangers or not, but that's not what the test is. The test is whether or not Fox exercised control over the activities here of Wheeler and Butowsky, not just that they were acting with a shared goal in mind or a shared purpose, because they all wanted to get the story out there. But for vicarious liability they have to have control over what they do.

THE COURT: I'm not sure what your argument is that they didn't have control over Zimmerman.

MR. TERRY: I'm not arguing they don't have control over Zimmerman. My argument is they did not have control over Butowsky and Wheeler. The complaint actually makes pretty clear that Fox didn't have control over Butowsky and Wheeler.

1 They explain that Rod Wheeler, the night before
2 Malia's Zimmerman's story was published, went on a local TV
3 station, Fox 5, and essentially previewed the story and talked
4 about his information that a federal investigator had revealed
5 that Seth Rich had communicated directly with WikiLeaks. They
6 alleged that before that, before that interview, Rod Wheeler
7 had expressed concern that people at Fox would be unhappy with
8 him if he were to do that interview.

9 THE COURT: But my understanding of the Fox/Wheeler
10 relationship is that that was pretty much an established
11 relationship from the beginning.

12 MR. TERRY: Rod Wheeler was an occasional paid
13 contributor on Fox.

14 THE COURT: And it was anticipated that he would be so
15 on this issue and it was anticipated that he was going to do
16 further research in furtherance of that relationship on this
17 issue.

18 MR. TERRY: We don't dispute that for the purposes of
19 this motion at all, but that doesn't address the question of
20 control.

21 THE COURT: Who has more control over Wheeler than Fox
22 News?

23 MR. TERRY: They had no control over Wheeler.

24 THE COURT: Wheeler was at least -- I wouldn't say
25 their employee, but was at least doing work in furtherance of

1 his paid relationship with Fox.

2 MR. TERRY: His paid agreement with Fox makes clear
3 that he's a contractor, independent contractor.

4 THE COURT: And he was such a person when he entered
5 into a contract with the Riches.

6 MR. TERRY: That's true. He was an independent
7 contractor. He was paid for his appearances and his off-air
8 assistance in advance of his appearances.

9 THE COURT: It was pretty clear at that point that he
10 wasn't going to sell his story to the New York Times; that the
11 result of his investigation was going to be supplied to Fox
12 News pursuant to his paid relationship with Fox News.

13 MR. TERRY: He wasn't paid for any of the work he did
14 in relation to the Seth Rich.

15 THE COURT: He was paid to be a commentator and the
16 thing he was going to comment about was the Seth Rich.

17 MR. TERRY: When he did comment on it he was paid for
18 commenting on it. But being an independent contractor doesn't
19 establish vicarious liability. For there to be vicarious
20 liability you've got to be an employee or you've got to have
21 sufficient control over his conduct, and they don't allege
22 either one. They don't allege that Fox controlled how he did
23 his work, what he did, when he did it. They need to allege all
24 of those things to create vicarious liability for what he did
25 along the way.

1 THE COURT: That's not completely accurate. What they
2 have to demonstrate is that they had control over the conduct
3 that constitutes the outrageous conduct. That's why I started
4 with that basic question.

5 MR. TERRY: That's right. Let's take that.

6 THE COURT: They don't have to have total control over
7 his activities. They don't have to know when he shows up, who
8 he talks to. They don't have to have that.

9 We have to focus on what is it that they say is the
10 outrageous conduct, and they may or may not be vicariously
11 liable for his outrageous conduct, depending on how you define
12 that outrageous conduct.

13 MR. TERRY: I agree. That's exactly the right
14 question. Looking at the conduct that they attribute to
15 Wheeler, we have to ask whether or not Fox controlled that
16 conduct, and that conduct basically falls into two buckets.
17 There are the allegations that he somehow misled the Rich
18 family by failing to reveal that he was working with Fox News,
19 and there are the allegations that he made false statements
20 about Seth Rich. Neither of those, with the exception of the
21 ones that were published on Fox's website --

22 THE COURT: Those are the ones that are primarily at
23 issue.

24 MR. TERRY: The Fox 5 conversation, that live
25 interview, is a perfect example of something we didn't control.

1 Malia Zimmerman said, you shouldn't do that, don't do that, you
2 are going to take away our story before I run it, and he went
3 ahead and did it anyway. Why did he do it? Because Fox had no
4 control over what he was doing.

5 THE COURT: Again, it depends on which publication is
6 at issue. If the publication at issue is Fox News publishing
7 the statements or the opinions or findings of Wheeler, that's
8 not even vicarious liability. Fox is responsible for what it
9 publishes and it clearly published this story. I am not sure
10 which part of is really vicarious liability for Fox.

11 MR. TERRY: Everything is vicarious liability with the
12 exception of Fox's own publication, which would be on its
13 website and Fox News shows. Let's take Fox 5. Fox 5 is a
14 different company. It's a local station. There is no
15 allegation that Fox News controls Fox 5. We argue in our
16 motion to dismiss there is no vicarious liability for what Fox
17 5 published, and the plaintiffs ignore that entirely. They
18 didn't answer it. We are not liable --

19 THE COURT: There is not a significant distinction
20 between what was published on Fox News and what was published
21 on Fox 5.

22 MR. TERRY: I would agree with that.

23 You get to the conduct. You have got the publication
24 and we have explained, for a host of reasons, why the
25 publication itself is not actionable. You have the conduct by

1 Rod Wheeler. And the conduct by Rod Wheeler, which is
2 allegedly outrageous, is talking to Malia Zimmerman and failing
3 to tell the Riches that he was working with Malia Zimmerman
4 when he was conducting the investigation on their behalf.

5 But what Rod Wheeler said to the Riches, when he said
6 it, how he said it, what he revealed, Fox had no control over
7 whatsoever. They weren't involved in that relationship at all.
8 They had no ability to know what he was saying.

9 THE COURT: They were involved in the relationship.
10 You made the distinction between the content of the publication
11 and the conduct. One could argue the other way, too, if they
12 were alleging such a fact, if there is a basis to allege such a
13 fact. But to say that they didn't have any control over what
14 he told Zimmerman doesn't address the question of whether they
15 have control over whether the information was going to be
16 transferred to Zimmerman to be published on Fox News.

17 MR. TERRY: The only thing they had control over was
18 what they were going to do with that information. They didn't
19 have control over whether or not he would give them that
20 information. They didn't have control --

21 THE COURT: I don't understand. I am not sure why
22 that's so. That's what I say. Seems to me that that was the
23 original intent, that they were going -- the idea was going to
24 be that this paid commentator for Fox News was going to do an
25 investigation that was going to result in his turning that

1 information over to Fox News to be published. And if he didn't
2 do that, it would significantly interfere with his
3 relationship, his paid commentator relationship with Fox News.

4 MR. TERRY: I disagree strongly with that last part.
5 He didn't have any obligation to provide information that he
6 got as a private detective to Malia Zimmerman.

7 THE COURT: You are saying if they said to him, even
8 if they said to him, we just found out that you were hired by
9 the Riches and you did an investigation and we want you to come
10 on and discuss the results of that investigation, you don't
11 think that they could politely request that he do that pursuant
12 to his commentator relationship with Fox News?

13 MR. TERRY: They could not. He has no obligation to
14 appear.

15 THE COURT: What is his obligation as a commentator on
16 Fox News?

17 MR. TERRY: None.

18 THE COURT: It has got to be something. He is getting
19 paid for something.

20 MR. TERRY: They call him up. If he is available and
21 comments, he gets paid.

22 THE COURT: I don't know. You think he could have
23 responded to Fox News' request, I refuse to give you this
24 information, I am going to give it to the Washington Post?

25 MR. TERRY: What he could do is say, I can't give that

1 to you because it's confidential.

2 THE COURT: That's different. That's not an issue of
3 control. That's an issue of contractual relationship, as you
4 say. I'm just trying to address your question of control. It
5 seems to me that maybe they don't have control, but clearly he
6 has such a relationship with Fox News -- and they knew enough
7 about the nature of his activities that one could argue that
8 they had control over where he was going to disseminate this
9 information and whether he was going to give it to them for
10 publication or even give it to Zimmerman, who was working for
11 them.

12 MR. TERRY: Of course, none of this is alleged.

13 THE COURT: You say none of it is alleged, but you are
14 saying that somehow that's the deficiency here, because you are
15 saying they don't have control. I mean, it may not be alleged
16 that they have control, but it's alleged that we have a
17 reporter who works for Fox News. We have a consultant who
18 works for Fox News who is doing an investigation. We have
19 Butowsky, who has also a relationship with Fox News, who is
20 paying Wheeler to do the investigation for the Riches.

21 And they all intend that the result of that
22 investigation is he is going to give that information to
23 Zimmerman and help her write an article for Fox News and get on
24 Fox News in relationship to his role as a commentator and
25 discuss the results of that investigation.

1 What have I just said that is incorrect?

2 MR. TERRY: I don't think we have to dispute any of
3 that for the purposes of our motion because none of that has to
4 do with whether or not Fox had control over the alleged
5 wrongful conduct by Wheeler. None of that has to do with
6 whether or not Wheeler lied to the Riches at all. None of that
7 gave Fox control. If you take everything that is said as
8 accurate, none of that gave Fox control over what Wheeler said
9 to the Rich family, what work Wheeler performed for the Rich
10 family.

11 THE COURT: You say that's not alleged. Would you
12 make that same argument if the facts were in fact that Fox News
13 told Wheeler to lie to the Riches?

14 MR. TERRY: If Fox News told Wheeler to lie to the
15 Riches and they had control over what he did, they would
16 clearly be vicariously liable.

17 THE COURT: You are giving me two different elements
18 and the second element doesn't make sense. You say, if they
19 told him and had control. I am trying to figure out what would
20 demonstrate control. So it's not an and. If they told their
21 paid commentator to lie to the Riches, could that itself be a
22 demonstration of control? That's the question. Not and had
23 control. I'm trying to figure out what kind of relationship
24 would minimally constitute that control.

25 MR. TERRY: Yes. Control is not demonstrated by your

1 ability to tell somebody to do things. If it were, my life
2 would be a lot different. There is a difference between intent
3 and control.

4 THE COURT: If you order one of the firm's associates
5 to do something, why isn't that control?

6 MR. TERRY: Because I have control over what the firm
7 associates do at work, if I order them to do something at
8 work --

9 THE COURT: I'm trying to understand how they don't
10 have control over Wheeler. I don't know of any demonstration
11 here that Wheeler was in a position to make a decision contrary
12 to what Fox News wanted him to do, given his relationship with
13 Fox News, given his contract with the Riches, given his payment
14 for that contractual relationship by Butowsky. What is it that
15 Rich gets to go off and do on his own?

16 MR. TERRY: There are three things I want to say in
17 response to that.

18 First of all, my ability to tell somebody to do
19 something, like Fox's ability to tell somebody to do something,
20 only creates vicarious liability if it is accompanied by an
21 ability to make them do that thing or to punish them if they
22 don't. Those allegations are missing here. There are no
23 allegations that Fox had the authority to enforce any of that,
24 which is what would create control.

25 Second, your question sort of reverses the burden.

1 It's their burden to allege facts from which control can be
2 inferred, not my burden to show there are contrary facts which
3 would defeat control. But even if it were, their own
4 allegations established that we didn't have control over Rod
5 Wheeler, and also not over Mr. Butowsky.

6 As for Mr. Wheeler, the entire story about him going
7 on Fox 5, allegedly contrary to the wishes of producers at Fox
8 in New York, contrary to the wishes of Malia Zimmerman, show
9 that we didn't have control over what he was doing.

10 THE COURT: I understand that. But you're
11 concentrating only on the control theory. This is more than
12 just a control theory. This is also a claim of aiding and
13 abetting, which isn't a control theory, and there's also a
14 claim of conspiracy amongst all of these defendants to commit
15 these acts, which is neither a controlled theory.

16 MR. TERRY: Correct. I've just been addressing
17 vicarious liability, which requires control. For them to
18 proceed under vicarious liability and, therefore, assert a
19 direct claim, as opposed to a concerted action theory, they
20 have to show that control.

21 THE COURT: Which count do you claim is the control
22 count?

23 MR. TERRY: That would be through all of their direct
24 claims.

25 THE COURT: Why? That's not necessarily so. They

could be directly liable by their own conduct, even though they don't have control. If they participated in the conduct that's alleged to be tortious conduct, tortious interference conduct and/or intentional infliction of emotional distress, if we sat around in a room, five of us, and decided that we were going to do this, it doesn't matter which one of us is in control.

MR. TERRY: That's true. If there were facts that would permit a direct claim against Fox, based on its conduct, then they would have a claim.

They also allege the direct, not concerted action, claims against us based on the conduct of Wheeler and Butowsky. My point is for Counts One through Three -- I'm sorry. One through Four.

THE COURT: Are you making this control argument just on behalf of the defendant Fox News network?

MR. TERRY: And defendant Zimmerman.

THE COURT: I don't understand in what way there is even a theory that Zimmerman is vicariously liable because she had control. I don't read that in any of these paragraphs.

MR. TERRY: Our point is just that neither Fox nor Zimmerman can be directly liable for the actions of Butowsky and Wheeler.

THE COURT: Right. But they could be directly liable for their own actions acting in concert with others.

MR. TERRY: There are other flaws to the concerted

1 action theories, the aiding and abetting conspiracy. The
2 conspiracy, the principal flaw is that the touchstone of
3 conspiracy is there has to be an intent to cause the injury
4 that's at issue. There has to be an agreement to cause that.
5 What they don't allege --

6 THE COURT: That's true whether it's a conspiracy
7 theory or direct theory. If there is no such intent, then
8 there is no claim.

9 MR. TERRY: Because conspiracy is a specific-intent
10 type tort, there is a higher level of intent required.

11 THE COURT: So is intentional infliction of emotional
12 distress.

13 MR. TERRY: I would agree with that.

14 THE COURT: I don't see how you could have one without
15 the other in terms of the level of intent.

16 MR. TERRY: I agree with that. You should not have
17 either tort because they both require an intent to harm the
18 Riches, which is completely absent from the allegations in the
19 complaint and, frankly, inconsistent with the allegations in
20 the complaint.

21 The complaint, taking its allegations at their worst,
22 alleged that a conspiracy was to gin up a story accusing Seth
23 Rich of being the source for WikiLeaks, whether the evidence
24 supported it or not. There is no allegation whatsoever that
25 anyone intended to harm the Rich family, which is what they

would need to have a conspiracy claim for intentional infliction of emotional distress or tortious interference. There are no allegations like that at all.

As for the aiding and abetting claim --

THE COURT: I just don't see that as a separate argument. If they have not sufficiently alleged that any defendant had the requisite intent to inflict emotional distress on the plaintiffs or -- I guess that's really -- are you also making this argument with regard to tortious interference? I am quite sure.

MR. TERRY: I believe the conspiracy claim is just for intentional infliction.

THE COURT: It seems to me that if they don't have intentional infliction of emotional distress as a substantive claim, then they obviously don't have any kind of conspiracy or aiding and abetting or any other vicarious claim.

MR. TERRY: Correct.

THE COURT: I am not sure that there is a separate argument to be made that -- whose intent are you saying is less than someone else's intent?

MR. TERRY: There has got to be an agreement among all three to cause that end for it to be a conspiracy. It's not just that we possess the intent, Butowsky possess its the intent, Wheeler possesses the intent. All three of us not only have to possess an intent, but to agree to a course of action

to cause that harm. That's what's missing, an agreement to come together to cause the harm that brings the Rich family to court, which is, as they say, intentional infliction of emotional distress on them, and there is no allegation that anyone agreed to inflict emotional distress on them, wanted that to happen or intended that to happen.

As for the aiding and abetting claim, the aiding and abetting claim requires substantial assistance for the wrongs at issue. Our point is simply that as for the particular conduct leading up to the article, there is no allegation that Fox News substantially assisted either Butowsky or Mr. Wheeler in making misrepresentations.

I do want to speak very briefly about the issue of vicarious liability regarding Mr. Butowsky. We spent a lot of time talking about Mr. Wheeler. There is no allegation that what Mr. Butowsky was doing here in reference to this whole issue was the result of him having a contributor agreement with Fox. He is not alleged to have a contributor agreement with Fox. I believe he described it as an occasional unpaid contributor to Fox. There is no allegation that they had any control whatsoever over anything Butowsky did, and that's particularly true with some of the Tweets and other interviews and communications that Mr. Butowsky made after the Fox News article regarding Seth Rich was published because some of those things are directly contrary to things that Fox News said in

1 its own report.

2 For example, the report, on the same day it's
3 published, is updated with a statement from the family
4 essentially disavowing Rod Wheeler and saying he's not
5 authorized to speak for us. You should not trust those
6 conclusions. And there are statements from Butowsky later on,
7 I believe, in a call interview where he is alleged to have
8 suggested that the Rich family agreed with the conclusions set
9 forth by Wheeler.

10 THE COURT: Except that if they have sufficiently
11 alleged that there was an intent to inflict emotional distress
12 on the Riches and each one of these individuals had such an
13 intent, there isn't really a requirement that you be aware of
14 every single act in furtherance of that.

15 MR. TERRY: Of a conspiracy, that's true.

16 THE COURT: Of the conspiracy or any other theory. I
17 am not sure what the difference is that you made. If we all
18 agreed we intended to inflict emotional distress and we
19 collectively did 10 things to carry that out, if I do three of
20 those things, I don't necessarily have to be aware of every one
21 of the things that you do.

22 MR. TERRY: That's true with respect to a conspiracy
23 claim.

24 THE COURT: No. What claim do you say that that's not
25 true for?

1 MR. TERRY: The direct action claims, Counts One and
2 Count Two. We certainly can't be vicariously liable for
3 conduct that Butowsky engaged in on his own, either before or
4 after the broadcast. There are no allegations whatsoever that
5 Fox had any means or method of controlling what Butowsky did.
6 They don't say we controlled what he did, when he did it, how
7 he did it.

8 And particularized conduct that they attribute to
9 Butowsky, especially after the report, is conduct that is
10 contrary to what Fox was reporting. And I am just pointing to
11 that as evidence that we had no control over what Butowsky did,
12 that he is a wholly independent actor and what he does, whether
13 it's tortious or not, does not reflect on Fox and cannot create
14 liability for Fox.

15 THE COURT: Again, I am not sure that I accept the
16 proposition that this is simply a control issue. I am not sure
17 that it cannot also simply be a knowledge and intent issue.

18 MR. TERRY: Knowledge and intent, unless you are
19 talking about a conspiracy claim, is not enough to create a
20 tort.

21 THE COURT: I am not sure. If you and I decide that
22 we are going to inflict emotional distress on a certain
23 individual and I say, well, you know what, I am going to do X
24 and then you say to me, OK, well, I am going to do Y, and we
25 both go off and do those things, you can't argue that somehow

1 they can't make out the claim of intentional infliction of
2 emotional distress because I didn't control the thing that I
3 knew you were going to do in furtherance of our intent to
4 inflict emotional distress.

5 MR. TERRY: There are three ways you can possibly hold
6 me liable for your action. One would be if I do control you, I
7 guess you are my employee or vice-versa. No. 2, through a
8 conspiracy theory, that we agreed to cause that end, which is
9 this situation you are describing there. Or the third would be
10 an aiding and abetting, where I provided you substantial
11 assistance.

12 THE COURT: Why isn't it aiding and abetting?

13 MR. TERRY: Because there is no allegation that we
14 substantially assisted in any of that post publication.

15 THE COURT: That's not true. If we both agree that we
16 are going to inflict emotional distress by engaging in
17 outrageous conduct, why am I not aiding and abetting that
18 conduct by my going off and doing A and you going off and doing
19 B? We are both aiding and abetting an intentional infliction
20 of emotional distress. We don't have to do it, each one of
21 those acts ourselves, and we don't have to make the other
22 person do the act. But we are both taking actions in
23 furtherance of our intent to inflict emotional distress and
24 with the knowledge that the other person is also going to
25 engage in acts to inflict emotional distress.

1 I am not sure I accept your narrow view or argument
2 that it has got to be somehow controlled to have direct
3 liability for conduct that we all agree that we are going to
4 engage in. That's like saying, if we decide that we are going
5 to commit an assault, and I decide I am going to hit somebody
6 with a baseball bat and you decide you are going to stab
7 somebody, and we go off and do it, that somehow I am less
8 culpable or there is no theory that I saw because I didn't stab
9 the person. I only hit him with the baseball bat.

10 MR. TERRY: Clearly you are liable for whacking him
11 with the bat. You would also be liable under a conspiracy
12 theory.

13 THE COURT: Could be liable on an aiding and abetting.

14 MR. TERRY: Depends on what your aim was.

15 THE COURT: I agree with you. That's all I'm
16 concentrating on. If our intent is to inflict emotional
17 distress, that's what's determinative, not who does the
18 individual act and not who controls the act that the other
19 people do. If we leave the room saying, your task is to do X,
20 my task is to do Y, so and so's task is to do Z, it doesn't
21 matter that I don't control you. We all have the same intent
22 and we all engaged in an overt act to further that intent and,
23 in doing so, that either individually or collectively inflicted
24 emotional distress.

25 MR. TERRY: That's definitely a conspiracy you are

1 describing. I think for you to have committed substantial
2 assistance such that you could be liable for an aiding and
3 abetting theory, going back to your baseball bat and knife
4 thing, the courts look to that. They look to the conduct that
5 you are engaged in. Did I substantially assist your conduct?

6 And the question would be, did I substantially assist
7 you with a knife or the baseball bat in some way, which would
8 be -- maybe my act was that I cornered the guy and let you do
9 it. Maybe I gave you the knife. But it has got to be
10 something that substantially assists the conduct because if you
11 have simply an agreement to cause a harm, but no activity in
12 support of that, the only theory of liability that could
13 support it would be a conspiracy theory.

14 I believe the reason why tort law draws that
15 distinction is the conspiracy theory requires the highest level
16 of intent because it doesn't necessarily require conduct by the
17 person who is being held liable associated with it. For aiding
18 and abetting there is a lower level of intent, but there is
19 actual conduct required in furtherance of the misconduct. I
20 would have had to have helped you in some way commit the
21 assault with the baseball bat, my independent tort of stabbing
22 the guy.

23 THE COURT: I am not sure that is true. I have to
24 help you assault the person. I can understand your argument.
25 I have to have the intent and I have to do something to help

1 you assault the person. I don't have to do something to help
2 you stab the person. I don't think that's the specific
3 requirement. If I do something that assists in the assault,
4 then I am liable for the assault. The question isn't whether
5 I'm liable for the stabbing.

6 In this case the question isn't, am I liable for this
7 particular act that is part of the intentional infliction of
8 emotional distress. The question is, did I assist you in
9 inflicting emotional distress.

10 MR. TERRY: Again, I think under a conspiracy theory,
11 that would work if there was that specific agreement. For
12 aiding and abetting you have to look to the conduct where there
13 is no control. If we control Butowsky, we would be liable for
14 the things he did within the scope of our control. If we have
15 an agreement with him to reach a certain end, we are liable for
16 what happens to cause that specific harm.

17 If we are talking about an aiding and abetting theory,
18 I think technically I am responsible for my assault with a
19 knife, you are responsible for your assault with the bat. We
20 may have conspired, in which case there is also conspiracy
21 liability. But unless I actually help you in some way with the
22 knife, I'm not also liable under an aiding and abetting theory
23 for that because it's two separate assaults.

24 THE COURT: Suppose I give you the bat.

25 MR. TERRY: That is clearly substantial assistance.

1 THE COURT: I understand that you say these
2 circumstances are not the broader definition of either direct
3 or vicarious or aiding and abetting and conspiracy liability,
4 but clearly I don't have to help stab him, under your
5 definition. You could say, well, I am going to go stab him,
6 but I don't have a knife. And I'll say, here is a knife, go
7 stab him with it. I don't have to have control over you to be
8 liable for the injury that occurs from that stabbing if my
9 intent is the same intent that you had and my assistance was by
10 giving you the knife.

11 MR. TERRY: I agree with that under a concerted action
12 theory you could still be liable. So the question is, first of
13 all, can we be directly liable.

14 THE COURT: Directly liable or on the concerted
15 action.

16 MR. TERRY: Or under concerted action. Concerted
17 action has additional requirements that are different for
18 control. What I'm saying is, of the three ways which we could
19 potentially be liable, we are liable for none of them because,
20 A --

21 THE COURT: When you say we, I am not quite sure who
22 you are referring to.

23 MR. TERRY: We meaning Fox. And I guess Ms. Zimmerman
24 as well.

25 THE COURT: What you are addressing is that they have

not sufficiently, even if they were to have alleged sufficiently a cause of action, I guess -- I am not sure how I would splice Butowsky.

MR. TERRY: At the highest level, take all of the content of the complaint, attribute any of it you want to Fox. None of that comes close to stating a claim for intentional infliction of emotional distress.

THE COURT: Because you are saying that the primary actor is Wheeler. Because of that?

MR. TERRY: I'm saying, even if you attributed at a high level, set aside vicarious liability and everything.

THE COURT: I understand that.

MR. TERRY: If you took all of the allegations and you said, Fox is somehow liable for everything that anybody did during the course of this scheme, none of that would add up to a tort of intentional infliction of emotional distress.

THE COURT: I understand now. I just don't understand why I need to be to go beyond that argument.

MR. TERRY: I would be happy to stop at that argument.

THE COURT: What is the theory that if somebody is liable, then somebody else is not. I am not sure who you want me to --

MR. TERRY: Sure. My point is that let's look at what Fox is actually alleged to have done. Even if you were to disagree with my constitutional arguments about why it is not

1 of and concerning the Rich family and therefore precluded, why
 2 outrage as a full-on matter would be certified actionable.
 3 Let's actually look at the conduct at issue.

4 First of all, all of the conduct added together
 5 doesn't add up to intentional infliction.

6 THE COURT: That argument I understand.

7 MR. TERRY: Second, if you wanted to parse it and see
 8 what Fox actually did as opposed to what we are being accused
 9 of being liable for through concerted action or vicarious
 10 liability, it is nothing other than routine news gathering. It
 11 is nothing other than publishing the story, talking to a
 12 source, helping the source talk to another source, the
 13 detective in the D.C. Police Department, and getting
 14 information. That's it. That's news gathering. That's not
 15 tortious activity.

16 The conduct that they really, I believe, latch onto as
 17 being part of the tort is Butowsky misrepresenting things to
 18 the family, Wheeler misrepresenting things to the family.

19 My point is, we can't be liable for that. Fox can't
 20 be liable for that because there is neither control nor a
 21 conspiracy to harm the Riches, nor is there substantial
 22 assistance in those acts of wrongdoing, no substantial
 23 assistance in lying to the Riches by either Wheeler or
 24 Butowsky.

25 And if you were to think, well, maybe the story is not

1 outrageous, because it is about a matter of public concern and
2 can't be constitutionally found to be outrageous, and it's just
3 not outrageous to allege that somebody was the leaker within
4 the meaning of the New York common law definition of outrage,
5 maybe I should look to see if some of these other comments that
6 happened after by Mr. Butowsky are outrageous. I don't think
7 they are. I don't think any of them come close. Even if they
8 were, none of them could be attributed to Fox.

9 They have a final theory of liability, which is
10 negligent supervision, that we failed to supervise Zimmerman.
11 There is a fundamental defect. That's something you need in a
12 negligence supervision claim, which is totally lacking in the
13 complaint, which is an allegation that we were on notice that
14 she was likely to engage in this type of behavior. There is no
15 allegation that Zimmerman has ever published --

16 THE COURT: She was likely to engage --

17 MR. TERRY: Tortious activity here, which is, I
18 suppose, writing a false story about somebody is the
19 allegation. There is no indication she has ever done that.
20 There is no allegation that we should have known she had a
21 propensity for doing that.

22 If the allegation is that she somehow oversaw
23 misrepresentations being made to the Rich family or breaches of
24 the confidentiality agreement, there is no allegation at all
25 that we were on notice that she had a propensity to do that.

So there really is no theory of liability for which a claim could proceed against Fox, and I think it's particularly dangerous to let this claim proceed, given how New York courts have treated intentional infliction claims in the past, as well as the constitutional issues.

This would be the first case that I'm aware of, at least since *Howell*, where a claim has been allowed to proceed in New York courts based upon statements made about another, and this is a particularly poor choice for doing that, given the nature of the allegations and incredibly important public concerns at issue. Thank you.

THE COURT: Who else wants to be heard?

You want to be heard before I hear from plaintiff?

MR. HARRISON: I would.

THE COURT: First we will take a short break.

(Recess)

THE COURT: Yes, sir.

MR. HARRISON: Good morning, your Honor, David Harrison on behalf of Mr. Butowsky. Good afternoon at this point.

I don't want to rehash arguments that have already been made by Fox. Some of them relate to Mr. Butowsky, some of them do not. To the extent your Honor has any questions or would like to focus the argument in any particular way with respect to some of the substantive claims, please feel free to

1 ask the questions.

2 I would like to focus my argument on jurisdiction for
3 now. To the extent that your Honor wants to get into any of
4 the other issues, I would be happy to discuss them.

5 First, Mr. Butowsky is not subject to personal
6 jurisdiction of this Court or the intentional infliction of
7 emotional distress of two Nebraska plaintiffs or the tortious
8 interference of a Maryland contract. Mr. Butowsky is a Texas
9 resident. It is not clear from the allegations in the
10 complaint whether Mr. Butowsky ever set foot in New York, let
11 alone in connection with these claims.

12 As we noted in our reply, this is not a close case.
13 Plaintiffs' entire personal jurisdiction argument hangs on a
14 single e-mail from Butowsky to employees of Fox. That lone
15 allegation quoting an e-mail to Fox producers after the article
16 in question was published does not remotely satisfy the
17 requirement of a transaction of business under the New York
18 long-arm statute.

19 Transaction of business under CPLR 302(A)(1) requires
20 plaintiffs to show purposeful conduct. Mr. Butowsky sought out
21 or initiated contact with New York. He solicited business in
22 New York. He established a continuing relationship with New
23 York. None of those things are present here.

24 They also must show that the transaction of business
25 has substantial connection to the claim itself. By plaintiffs'

own admission, and we may disagree about this point, the publication of the article is only a portion of the claim.

That single e-mail connecting Butowsky to New York by way of the employer of its recipients is clearly not enough under the New York long-arm statute. We don't even know if the people that received that e-mail were in New York at the time that they got it. We certainly don't know if Mr. Butowsky was in New York at the time that it was sent. All we know is that Fox News was based in New York or is based in New York and Mr. Butowsky sent an e-mail to employees of Fox News.

THE COURT: It's unclear to me what the nature of the relationship is between Butowsky and Fox News or their connection or their communications with regard to any of the relevant conduct.

MR. HARRISON: Historically, Mr. Butowsky, and this was provided in a declaration by the plaintiffs, had appeared on Fox News over the course of a few years and, for the most part, had been an unpaid contributor sharing knowledge and expertise on certain financial information and the economy.

THE COURT: Was this similar to Wheeler, some sort of paid consultant or commentator?

MR. HARRISON: It is not, no. He was not a paid consultant or commentator. There was no agreement between Mr. Butowsky and Fox News. Any contributions that he had with respect to Fox programming were unpaid and voluntary, many

1 times not in New York or had any connection to New York
2 whatsoever.

3 THE COURT: That's why I'm still unclear about what
4 you say the relationship is and what the nature of that contact
5 was. Is there some reason for me to assume that the nature of
6 that activity with Fox News takes place someplace other than
7 New York?

8 MR. HARRISON: Yes, I think that's right. I do think
9 that many of the appearances Ed Butowsky made on Fox News took
10 place in other locations; for example, Dallas, Texas, where he
11 lives.

12 THE COURT: As opposed to the studio in New York?

13 MR. HARRISON: Correct.

14 THE COURT: What is the nature of the frequency of his
15 appearances? And you say these were uncompensated appearances
16 on Fox News?

17 MR. HARRISON: That's correct and entirely unrelated
18 to the claims in this case.

19 If I just might point out, there is no argument in the
20 briefing and certainly not alleged in the complaint that there
21 is a basis for general jurisdiction here. It's not alleged
22 that Mr. Butowsky had any commercial or financial relationship
23 with any New York entities. It's not alleged that he spent any
24 prolonged period of time in New York.

25 THE COURT: I don't know what that means. Is he in

1 New York on Fox Business once a month, once a year, once a
2 week?

3 MR. HARRISON: I don't believe he has been on Fox
4 Business or any Fox programming for several months, if not over
5 a year. But his historical involvement or presence on Fox was
6 sporadic at best. Over the course of several years he
7 certainly was a contributor. He provided information regarding
8 his knowledge of the economy. But he wasn't a permanent
9 Fixture. He didn't host any shows. He was an unpaid guest on
10 an occasional basis for certain of Fox News programming.

11 THE COURT: I'm unclear about what is supposed to be
12 the nature of the relationship and communication with Fox or
13 Zimmerman regarding the Rich issue.

14 MR. HARRISON: There are no allegations in the
15 complaint, but for one, regarding any communications or
16 involvement between Ed Butowsky and anyone from Fox News in New
17 York. There are allegations --

18 THE COURT: I am supposed to take from that what, that
19 they didn't occur? Because I'm also trying to figure out not
20 only are you going to argue that there is a demonstration of
21 sufficient contacts with jurisdiction, but if not, then the
22 jurisdictional discovery would be appropriate to demonstrate,
23 in fact, that such a relationship exists.

24 MR. HARRISON: To answer your first question, I think
25 you are to take from that that that didn't occur. I think the

1 vast majority of the allegations in the complaint relate to
2 interactions with Malia Zimmerman and/or Rod Wheeler. Malia
3 Zimmerman was a Fox reporter, but she was based in California.
4 There is no allegation in the complaint, as far as I'm aware,
5 that Malia Zimmerman was in New York at all. Any interaction
6 that Ed Butowsky had that connected him to Fox News were with
7 Malia Zimmerman, but for this one e-mail that occurred after
8 the publication.

9 THE COURT: Remind me what the e-mail, the substance
10 of the e-mail was.

11 MR. HARRISON: The substance of the e-mail said
12 something to the effect of, I'm involved in putting this
13 together. The takeaway of this article is that Seth Rich was
14 involved in the production of e-mails to WikiLeaks, something
15 to that effect. It was a summary of the article that had
16 already been published, essentially.

17 THE COURT: I guess the real question is, what am I
18 supposed to conclude with regard to the nature of the contacts
19 and activity other than somehow there was some fortuitous
20 connection between all these folks and entities with regard to
21 the Rich story?

22 MR. HARRISON: I think the conclusion is that they
23 don't exist. If I might just point to that very e-mail, Ed
24 Butowsky is making an introduction to people at Fox News. They
25 claim that these are producers that were in New York. We don't

know if they were in New York at the time they received the e-mail or not, but they were employed by Fox News and Fox News is headquartered there. But he is introducing the fact that he is involved. They were not aware of his involvement prior to that e-mail, I think, is the takeaway.

His interaction prior to the sending of that e-mail was limited to communications with Malia Zimmerman and, of course, Rod Wheeler. Malia Zimmerman, who was employed by Fox News as a reporter, she was based in California. The contacts that Ed Butowsky had with New York are nonexistent.

The incidental headquarters of Fox in New York, based on New York law, is insufficient for personal jurisdiction. We cite cases in our briefing, many cases in New York where courts have found that communications into the forum state are insufficient in and of themselves to confer jurisdiction.

THE COURT: Am I supposed to conclude that the conversations that Butowsky had with the Riches and the conversations that Butowsky had with Wheeler that form this agreement that Wheeler would do an investigation for the Riches that there was no involvement or contact with Zimmerman or Fox News with regard to those issues during that period of time?

MR. HARRISON: I don't think that's my point. And I'm not --

THE COURT: Isn't that the important point? When he is engaged in communications with the Riches and makes a

1 decision that he is going to have them enter into an agreement
2 with Wheeler to do an investigation and he is going to fund
3 that investigation, I am trying to figure out what involvement
4 does Fox News and Zimmerman have in that that I should have to
5 assess with regard to his jurisdictional contacts?

6 MR. HARRISON: I'm not aware of any involvement. It's
7 certainly not alleged that they were involved in those
8 interactions.

9 My point is, if this lawsuit was in Texas, certainly
10 there would be an argument that Texas courts have personal
11 jurisdiction over Ed Butowsky. If this lawsuit was in
12 Nebraska, maybe there would be an argument if there was
13 personal jurisdiction in Nebraska.

14 THE COURT: It is unclear to me what Butowsky's
15 intention was. What was going to be the end game, as they say?
16 What was this going to conclude once he got the idea that he
17 wanted to contact the Riches and contact Wheeler and put them
18 together and pay for Wheeler to do this investigation? What
19 was this supposed to culminate into?

20 MR. HARRISON: The complaint alleges that Mr. Butowsky
21 wanted to further a conspiracy theory.

22 THE COURT: I know that's what the complaint alleges.
23 I assume that's not what you are representing to me was the
24 purpose.

25 MR. HARRISON: Even if we were to assume that the

1 purpose was to --

2 THE COURT: I'm not assuming anything. I'm asking
3 you. If you don't want to answer, you can say you don't want
4 to answer. I am just trying to understand whether there is
5 some basis to further pursue the issue of jurisdiction if
6 further discovery would reveal the true contacts that are
7 somehow different than what is shown to the plaintiffs now and
8 somehow more significant than has been revealed to the Court.

9 MR. HARRISON: Even if the intent was for there to be
10 ultimately a publication, nothing in the complaint supports
11 there being any contacts with regard to the publication of this
12 news article with New York. Everything in the complaint
13 relates to communications or meetings and discussions outside
14 of New York, either from Dallas or in Washington, D.C.

15 THE COURT: Again, you say everything in the
16 complaint. I'm asking you about facts.

17 MR. HARRISON: I am not, as I sit here, aware of
18 anything beyond what's in the complaint. I am not aware of any
19 communications beyond what's alleged.

20 THE COURT: Do you have an answer to what was supposed
21 to be the end game of the Butowsky putting the Riches together?
22 Did he anticipate that he was going to give that information to
23 Fox News and have Fox News publish it, whether he was going to
24 give it to law enforcement? I'm not sure what --

25 MR. HARRISON: I think my point is, even assuming the

1 worst, even assuming that his intent was to have this article
2 or an article published by Fox News in New York, at least with
3 respect to jurisdiction, that all happened outside of New York.
4 Any acts in furtherance of that occurring --

5 THE COURT: I don't know that because I don't know
6 what communications he had with other individuals at Fox News
7 in New York in furtherance of this agreement.

8 MR. HARRISON: We don't know. We don't know that
9 question.

10 THE COURT: I don't know. Somebody knows. When
11 lawyers say, I don't know, Judge, I usually say, the person
12 sitting right next to you, your client, knows. That's what I'm
13 asking. I'm not asking you. I'm asking your client. Your
14 client can't say you don't know. You may not have asked him
15 the question, and they may not have volunteered that
16 information, but there is an answer out there. I am just
17 trying --

18 MR. HARRISON: The courts are clear that they do have
19 to make a *prima facie* case in order to get jurisdictional
20 discovery, and they have not made that case. They have made
21 one allegation in support of personal jurisdiction, one, and
22 that occurred after the publication and it suggests by the
23 nature of the communication that there had been no prior
24 communications with New York. There had only been
25 communications with Malia Zimmerman and Rod Wheeler.

1 Based on those facts, we could allow plaintiffs to go
2 on a fishing expedition, which I am sure they would like to do,
3 to try to find out what communications were had. But they
4 still have to meet a certain standard and they have not met it.

5 THE COURT: That's fine. Thank you.

6 I will hear from plaintiff.

7 MS. GAIL: May it please the Court, hello again. I'm
8 Lenny Gail. Along with Arun and Elisha we will be speaking on
9 behalf of the Riches.

10 Arun will respond to the defendants' legal challenges
11 to the specific causes of action for intentional infliction and
12 tortious interference.

13 And in accordance with your Honor's rule encouraging
14 courtroom advocacy by younger lawyers, Elisha is going to
15 address jurisdiction.

16 I will address three areas: First, the scope of the
17 complaint's factual allegations; second, the very, very, very
18 early posture at which we find ourselves today. This is a
19 12(b)(6). This is not summary judgment, let alone JNOV; third,
20 the noncause of action issues in connection with vicarious
21 liability, aiding and abetting, conspiracy, and negligent
22 supervision.

23 First, let's talk about the scope of the allegations.
24 The defendants pretend as if Joel and Mary's complaint
25 singularly alleges the publication of a false article. Don't

1 believe that for a second. Don't believe that the complaint's
2 allegations are that narrow. The complaint alleges far, far
3 more than the publication of a false article.

4 It's certainly true that Joel and Mary allege that Fox
5 intentionally published a false article about their deceased
6 son in May of 2016. The article falsely stated that Seth had
7 leaked the DNC e-mails. It made up direct confirmation from an
8 unnamed federal investigator and quoted that fictitious human
9 being and stating, quote, I have seen and read the e-mails
10 between Seth Rich and WikiLeaks. And the article pretended
11 that this lie, this fiction, was confirmed by an investigator
12 independently conducted at the family's behest and retention,
13 Mr. Wheeler. All of that is in the complaint.

14 But the complaint alleges far more than just that
15 false publication. It alleges a multifaceted scheme and
16 conduct that began in at least December 2016, six months before
17 the article's publication, and it continues essentially through
18 today.

19 Your Honor, we have prepared a brief handout we have
20 given to counsel. May I approach?

21 THE COURT: Yes.

22 MS. GAIL: These are four timelines covering different
23 time periods. They include many of the complaint's
24 allegations. They are in chronological order and we have given
25 you a citation to the complaint's paragraph.

1 The first page covers all the activity at issue from
2 the beginning until today and, as you can see here, visually,
3 the Riches have alleged a multifaceted scheme hatched and
4 executed by the defendants' conduct for at least a year and a
5 half. You can see in this first page that the complaint
6 alleges the defendants' scheme began in December 2016, at
7 least. We don't know what we don't know because we have not
8 had any discovery. And it continued through the complaint's
9 filing in March of 2018 and even through today, as Fox
10 continues to roll with the lie on its website.

11 If I could ask the Court, please, to turn to the
12 second page, you can see here the early part of the scheme, the
13 early conduct included calculated efforts in December 2016,
14 January, February, and March 2017. Those lies and deceptions
15 created from nothing a relationship of trust with Joel and
16 Mary, grieving parents of a deceased child. The defendants'
17 scheme used Wheeler as a tool to manipulate the Riches. They,
18 through Wheeler, gave access to Fox to law enforcement
19 officials and allowed Fox to confer false legitimacy on their
20 fictitious tale.

21 THE COURT: Which one of these activities do you
22 characterize as the outrageous conduct?

23 MS. GAIL: I will give you some examples. I don't
24 want to be comprehensive because the complaint is long and
25 detailed.

1 THE COURT: Give me something specific to latch onto
2 because, for example, Joel and Mary executed an agreement to
3 engage Wheeler. I cannot find, as a matter of law, that that
4 in and of itself constitutes outrageous conduct.

5 MS. GAIL: If that agreement was entered into through
6 duplicity and lies and with an intent to essentially get
7 information that would later be published, that would
8 constitute intentional infliction of emotional distress.

9 THE COURT: That's not true because I have got to find
10 the outrageous conduct. You can't simply say, because I drove
11 to the Riches' house, my driving to their house is part of the
12 outrageous conduct. That's not the way it works. You have to
13 tell me what is the specific conduct that I am supposed to rely
14 upon to say, it is clear that one can find that doing X was
15 outrageous.

16 You can't keep going and I can't keep going through
17 this and saying, OK, this item is outrageous if you latch it
18 onto something else. You have to tell me which one of them
19 that I am latching it onto that makes it outrageous. That's
20 why I give you the first example you give me.

21 No. I can't accept, as a matter of law, that
22 executing an agreement to engage Wheeler is outrageous conduct.
23 That is not outrageous conduct. Something else has got to be
24 outrageous conduct other than signing the agreement.

25 MS. GAIL: Fair enough.

1 THE COURT: Give me -- you don't have to be
2 exhaustive. Give me some of the examples and some of the
3 primary examples that you want me, consistent with the case
4 law, to say this falls into the category of outrageous conduct.

5 MS. GAIL: I will, your Honor. Let me take your
6 example of me going somewhere. You are saying going somewhere
7 cannot be outrageous conduct. Asking someone to go somewhere
8 cannot be outrageous conduct, or at least I heard the Court
9 implying that.

10 If I said to you that I would like you to go to the
11 temple because we are both people of faith and I want you to go
12 to the temple because I care about you and I want to give you a
13 benefit when you arrive at the temple, I want to help you find
14 your child's murderer.

15 THE COURT: Why would that be outrageous conduct in
16 and of itself?

17 MS. GAIL: It is duplicity. It is a lie. It is
18 deceit.

19 THE COURT: Clearly, the case law does not say that a
20 lie and deceit is outrageous conduct. There is no case that
21 says that. That doesn't qualify in and of itself as outrageous
22 conduct. If you say to me, well, they lied to the Riches in
23 invoking their religion in order to establish a relationship
24 with them, that in and of itself is not illegal; it's not in
25 and of itself outrageous conduct. It may not be a nice thing,

1 but it doesn't qualify by law as being outrageous conduct.

2 I need something more than that because if they did
3 that and then they followed through on everything that they
4 said that they were going to follow through on, then that would
5 be innocuous. That would be irrelevant.

6 MS. GAIL: But that wouldn't be this case.

7 THE COURT: Tell me what makes this case a different
8 case, and it's not the fact that they invoked the synagogue in
9 order to establish the relationship. I am not even sure what
10 the lie was you say that was in the context of the synagogue.

11 MS. GAIL: Mr. Butowsky was using religion to curry a
12 relationship anew with people where he basically wanted to
13 develop a relationship to con them into hiring someone for a --

14 THE COURT: What they wanted to do after that may
15 constitute outrageous conduct. Invoking religion in order to
16 establish the relationship does not qualify as outrageous
17 conduct.

18 MS. GAIL: Your Honor, let me just say, with all due
19 respect, if you slice up each thing that was done and
20 identified in isolation, there is always going to be an
21 argument that any one thing in isolation doesn't constitute
22 outrageous conduct.

23 THE COURT: I understand that. Also, as I always say
24 to the lawyers, there is another basic theory, that zero times
25 10 is still zero.

1 MS. GAIL: It's not zero.

2 THE COURT: You have got to give me something that is
3 evidence of outrageous conduct and not just simply say, well,
4 these 10 things by themselves are not outrageous, but when I
5 put them all together, they become outrageous. I need a
6 specific -- you say the outrageous conduct is that they did
7 what?

8 MS. GAIL: They, under false pretenses, inserted a
9 plant into the Riches' lives and gave that person the legal
10 ability to get access to information.

11 THE COURT: I am not sure what you are referring to.
12 You're talking about Wheeler?

13 MS. GAIL: Wheeler has planted, essentially, with the
14 Riches. Butowsky pays for Wheeler. First, he cultivates them
15 through means that I think a jury is going to find outrageous,
16 given the end that he has in mind.

17 THE COURT: You can't do that. You can't define the
18 beginning as the end. If you want to concentrate on the end,
19 that's one thing. But currying favor with them, even currying
20 favor with them with a bad intent is not outrageous conduct.

21 What has to come is some outrageous conduct that
22 causes them some injury after that. You can flavor it with
23 that. You can say, well, let me tell you the circumstances
24 under which they did this bad thing. You have to tell me what
25 is the bad thing that you are suing them for and the bad thing

1 that you are suing them for is not in currying favor through
2 their synagogue. That's not the bad thing that you are suing
3 them for.

4 What did Wheeler, Butowsky, or Zimmerman do that you
5 claim is the outrageous conduct that supports a finding that
6 they intentionally inflicted emotional distress? Currying
7 favor with them through the synagogue does not inflict
8 emotional distress. Give me something. Give me the bad part
9 of that.

10 MS. GAIL: The bad part is they got an agreement
11 through duplicity that resulted in, and they intended -- that's
12 why I keep going back -- and they intended the outcome of that
13 agreement to be access to information, the most intimate
14 information a family could have. They appropriated the
15 family's relationship with the detectives in D.C. that never
16 would have talked to them but for the fact that they got --

17 THE COURT: Why is this outrageous, to get them to
18 talk to the --

19 MS. GAIL: Because they weren't doing the search for
20 truth.

21 THE COURT: But the search for truth would have
22 involved them talking to law enforcement.

23 MS. GAIL: Not a sham person involved talking to law
24 enforcement. A real bona fide investigator that the Riches
25 never hired because they fell for the scheme.

1 THE COURT: I'm not worried about, as you characterize
2 it, about the narrowness or the extent of the activities. I'm
3 concentrating on specificity. I need you to be very specific
4 as to what conduct you say is outrageous and how that
5 outrageous conduct resulted in their injuries.

6 What did Wheeler do? Because you say, it all led up
7 to their agreement with Wheeler and that was a bad thing. From
8 the day that they met them in the synagogue to the day that
9 they signed the agreement with Wheeler, none of that was
10 outrageous conduct, was it?

11 MS. GAIL: It was outrageous in the sense that it took
12 the family's trust and allowed them to get access to
13 information that they never would have gotten.

14 THE COURT: But the outrageous conduct would be
15 abusing that trust.

16 MS. GAIL: Exactly.

17 THE COURT: You have to tell me. I understand that
18 argument. I am not trying to make you give me an argument that
19 you are not trying to make. I am trying to make you be
20 specific about it. The outrageous conduct is not signing the
21 agreement. The outrageous conduct is abusing that trust. When
22 did the outrageous conduct occur?

23 MS. GAIL: Using Wheeler's rights and the fact that he
24 represented the family, he and Butowsky and Zimmerman abused
25 the family's trust that they contractually got him to codify.

1 They abused it because their investigator wasn't an
2 investigator. Instead of having someone out trying to find the
3 killer, they had somebody parroting a political agenda.

4 THE COURT: What do you say Wheeler did that was
5 outrageous or what did they do? Because I'm trying to figure
6 out -- even if I were to splice it, I understand where the
7 story begins with Butowsky. But I am not sure how Butowsky's
8 relationship and how the relationship was established with the
9 Riches makes Zimmerman liable.

10 MS. GAIL: Take a look at the second page. On January
11 3, the exact same day that Butowsky contacts Joel, following up
12 in December and says, we met through Jeremy from your temple.
13 The very same day Zimmerman e-mails Joel and the Rich family
14 spokesman about Seth's murder.

15 THE COURT: What's outrageous about that? What's
16 outrageous about Zimmerman contacting the Riches as opposed to
17 anybody else contacting the Riches at that time about the
18 story? What is outrageous about it?

19 MS. GAIL: It's where it was going, Judge. The whole
20 point --

21 THE COURT: The outrageousness cannot be where it's
22 going. The outrageousness has got to be where it is. Tell me
23 where it got there. You say where it's going. When did it
24 turn into something that they did to the Riches that was
25 outrageous that caused them injury? As of January 3, no one

1 had done anything to the Riches to cause them any injury, as of
2 January 3.

3 MS. GAIL: The Riches did not know they were being --

4
5 THE COURT: That's where I am trying to get you focus
6 me. If you want me to latch onto something, give me something
7 to latch onto. Because I cannot say, well, it's sort of their
8 intent and they had this in the back of their mind and they
9 were planning to do this. No.

10 You have to tell me the same kind of examples I gave
11 them. I'm not particularly interested in when somebody came up
12 with, first, the idea that they might rob a bank. I want to
13 know when it is that they robbed the bank, and that's the
14 outrageous conduct. What they had in mind does not constitute
15 outrageous conduct. What they did would constitute outrageous
16 conduct. Tell me where it is that they took some action that I
17 can trace to an injury.

18 MS. GAIL: With all due respect, I think you can trace
19 what's going on in January to an injury.

20 THE COURT: Wait a minute. Butowsky contacts Joel by
21 e-mail saying, we met through Jeremy from your temple. That
22 didn't cause any injury at that point in time.

23 MS. GAIL: At that point in time, we agree.

24 THE COURT: Caused no injury. Zimmerman e-mailing
25 Joel and the Rich family spokesman about Seth's murder did not

1 at that time cause any injury.

2 MS. GAIL: Exactly.

3 THE COURT: What is it that happened after that that
4 you say is the outrageousness that caused the injury?

5 MS. GAIL: Let me try and answer this way, your Honor.
6 The Riches learned they are duped. The Riches feel emotional
7 distress.

8 THE COURT: When?

9 MS. GAIL: When the article is published.

10 THE COURT: Let me go to that point. Where is that on
11 your chart?

12 MS. GAIL: That is on page 4.

13 THE COURT: That's on page 4. What date?

14 MS. GAIL: May 16.

15 THE COURT: Which one.

16 MS. GAIL: That is when the Riches learned.

17 THE COURT: Which one?

18 MS. GAIL: It's all the stuff at the top. The article
19 is published on the 16th. There is allegations about --

20 THE COURT: I'm sorry. I have four different May 16
21 on that page.

22 MS. GAIL: If you look at the very bottom, the yellow,
23 the article was up from the 16th to the 23rd. They do the
24 retraction, nonretraction on the 23rd.

25 THE COURT: Was there any injury that you're

1 articulating that occurred before the publication of the
2 article?

3 MS. GAIL: There was because the investigation was
4 obstructed.

5 THE COURT: What was the injury that occurred to the
6 Riches prior to the article being published?

7 MS. GAIL: They had emotional distress because their
8 son's murder was unsolved.

9 THE COURT: That wasn't their fault.

10 MS. GAIL: We allege it was.

11 THE COURT: It is not solved today.

12 MS. GAIL: One of the reasons it's unresolved today is
13 because there was no investigator that the family hired that
14 was put on it, and all of the leads that were coming in were
15 divided up between this false investigator and the police.

16 THE COURT: Again, I am not following you. You say
17 that the emotional distress that they suffered occurred on May
18 16, when Fox published the story.

19 MS. GAIL: That's when they realized they were injured
20 by the outrageous conduct. That's when they learned. Then
21 they put together what had been done to them without their
22 knowing.

23 THE COURT: The injury is emotional distress.

24 MS. GAIL: Right.

25 THE COURT: That's not the date they became aware of

1 the injury. That has to be, at best, the date that the injury
2 occurred because you cannot have emotional distress and not
3 know it.

4 MS. GAIL: I understand.

5 THE COURT: They had no injury prior to May 16.

6 MS. GAIL: But there was outrageous conduct before the
7 16th and that's where I think the Court and I are disagreeing.

8 THE COURT: I am not disagreeing. I am just trying to
9 find it. You say the outrageous conduct that caused them
10 injury was the publication of the story on May 16.

11 MS. GAIL: No.

12 THE COURT: What is the outrageous conduct that caused
13 them injury?

14 MS. GAIL: The outrageous conduct that led to the
15 article that was published on the 16th, all of that conduct
16 caused injury.

17 THE COURT: Which one?

18 MS. GAIL: The duplicity with the family.

19 THE COURT: Where is that on your chart? Where is the
20 duplicity?

21 MS. GAIL: That is getting the agreement in place with
22 Wheeler. That whole agreement is a sham. It is entered into
23 under false pretenses and in outrageous terms. These are
24 grieving parents. Someone has come to them and said, I will
25 pay to help you find your son's murderer, and that was never

1 their agenda. That is outflippingracious, and the jury is
2 going to agree if your Honor let's them.

3 THE COURT: It has got to be two things. It has got
4 to be outrageous conduct, and I am not sure that there are a
5 lot of cases that simply say lying to somebody is outrageous
6 conduct.

7 MS. GAIL: This is more than that, Judge.

8 THE COURT: It has got to be more than that. Two, it
9 has got to be outrageous conduct that results in injury and
10 that articulable injury, under your theory, must be the
11 suffering of emotional distress. You say that they felt no
12 emotional distress until the article was published and the
13 article caused them emotional distress. Why?

14 MS. GAIL: Among other reasons, it was a fiction about
15 their child's culpability and it invoked them personally. It
16 invoked them personally because they used Wheeler's
17 confirmation of the fiction and that's --

18 THE COURT: They printed a false story?

19 MS. GAIL: In several different ways. And on top of
20 printing a false story, they kind of put the parents on the
21 hook for it. They said, and this is even confirmed by the
22 parents' private investigator. That never happened.

23 THE COURT: That's part of the argument.

24 MS. GAIL: Yes.

25 THE COURT: You say on May 16 publishing what was a

1 false story about the parents and the son --

2 MS. GAIL: Sure.

3 THE COURT: -- is what caused the injury.

4 MS. GAIL: And the conduct that led up to that caused
5 the injury.

6 THE COURT: When you say the conduct that led up to
7 that, you can't be that vague. Give me an example of the
8 conduct that led up to that that you are directly connecting to
9 the --

10 MS. GAIL: Getting them to hire Wheeler.

11 THE COURT: Getting them to hire Wheeler is, one, not
12 outrageous conduct; two, they didn't suffer any injury because
13 of that. If Wheeler had done what they hired Wheeler to do, as
14 you say, there would have never been any injury.

15 MS. GAIL: Your Honor, what I would like to do, if I
16 can, isolate a few more factual points, talk about these other
17 things, and let Arun deal with this.

18 It's important for us to know that it is conduct that
19 they learn of on the date of the publication, not entirely
20 because the publication is false. They learn of implicitness when
21 they read the publication and they see Wheeler quoted. That's
22 unrelated to its falsity, though it happens to be contained in
23 a false article.

24 THE COURT: You are saying their injury was that they
25 found out that they had been duped.

1 MS. GAIL: That is one of the sources of their
2 horrible emotional distress, yes.

3 THE COURT: What is the other source?

4 MS. GAIL: That the story was false, that they had
5 been deprived the right of hiring an investigator to try to
6 solve their son's murder.

7 Let me if, I can, talk about the posture. As the
8 Court well knows, we are on a 12(b)(6) here. All of the
9 complaint's allegations are to be taken as true and reasonable
10 inferences drawn in our favor.

11 If you listen closely to what Mr. Terry was doing, a
12 lot of what he was doing was drawing inferences in Fox's favor,
13 and that is impermissible on a 12(b)(6).

14 Because the complaint contains details on certain
15 matters, it's easy for the Court to forget that it's this early
16 posture. It's easy for us to forget the entirety of what Joel
17 and Mary do not know and cannot show at this stage and that's
18 because the evidence will demonstrate that the full nature and
19 extent of the defendants' scheme and conduct is within their
20 control. The vast majority of the evidence is in their
21 custody, in their documents, in their text messages, and in
22 their testimony under oath. We have not even begun the process
23 of getting that information, of learning all the conduct, of
24 learning the communications and coordination that went on.

25 THE COURT: Your obligation is pretty straightforward.

1 You have got to allege conduct that caused them emotional
2 distress. That's no secret. That's not in their control.
3 That's what you know because you know what caused them
4 emotional distress.

5 MS. GAIL: That's true.

6 THE COURT: More so than they know what caused them
7 emotional distress. The question is, which paragraphs of your
8 complaint support the outrageous conduct that you claim that
9 when that conduct was engaged in, you can see the direct line
10 of suffering by the plaintiffs.

11 MS. GAIL: We have it and Arun will give you the exact
12 paragraph numbers that do that.

13 THE COURT: I agree with you. You are right. The
14 burden is not to be shifted. This isn't like you have a claim
15 that depends on something that they know about that you don't
16 know about. Your claim is that your client suffered emotional
17 distress and they can only suffer emotional distress from
18 something that they know about. You have to articulate that
19 when I found out X, I suffered emotional distress. That's all
20 I'm looking for. That's all I want to concentrate on.

21 MS. GAIL: I'll give you an example and then we will
22 proceed with that in a few minutes.

23 One example of what caused the client's emotional
24 distress is that Fox said they were underdoing an investigation
25 of what editorial policies were violated. We have no idea

1 whether they did anything. It appears they did nothing. They
2 published nothing. That's just one example.

3 THE COURT: How did that cause them emotional distress
4 and how is that outrageous conduct?

5 MS. GAIL: It's outrageous for you to say, look, oops,
6 I am going to do an investigation and not actually fulfill what
7 you said you were going to do.

8 THE COURT: I am not sure I know any case that puts
9 that on the level of outrageous conduct. What you are saying
10 is, it's outrageous conduct to be lied to. It has got to be
11 more than that. You agree?

12 MS. GAIL: It has to be more than being lied to. I
13 think the difficulty, with all due respect, you're slicing each
14 individual aspect of what Fox did or didn't do.

15 THE COURT: I am not. But I am not going to let you
16 simply say, well, I just want to throw in a whole bunch of
17 stuff in a suit and call it outrageous conduct.

18 MS. GAIL: I understand that.

19 THE COURT: You can't do that. You have to be able to
20 be specific about it because the outrageous conduct has got to
21 be what they reacted to.

22 MS. GAIL: What caused the emotional distress.

23 THE COURT: What caused the emotional distress. It
24 can't be that what caused the emotional distress is that they
25 had some secret meeting 10 months ago in which they said they

are going to do the Riches, because they didn't know about that. They didn't find out about that.

Even now you say you want to find out about that discovery. But you can find out about that in terms of establishing evidence to further their intent, but it can't cause emotional distress if they don't know about it.

MS. GAIL: Your Honor, I am saying there are other aspects of the conduct that address things like agency or vicarious liability and conspiracy in aiding and abetting that discovery will give us. That's all I'm saying. I agree with the Court, and I am going to turn it over to Arun now to just answer these questions.

THE COURT: Let me just ask you one more question because we might be able to save time. Why isn't your other causes of action under your theory of aiding and abetting and conspiracy, why aren't they duplicative of your intentional infliction of emotional distress, first cause of action? How is that different?

MS. GAIL: They are unnecessary if we prove Fox's liability directly, as the Court was making clear.

In the unlikely event that the Court thinks otherwise, we also can put Fox on the hook for having substantially assisted through aiding and abetting and through conspiring with Butowsky and Wheeler and for negligently supervising --

THE COURT: You think there is some theory on these

1 facts where you can fail on Count One and prevail on Count Two
2 or Three?

3 MS. GAIL: I think it's unlikely, Judge, but we are
4 before we have done any discovery, so I don't know whether they
5 are going to take the position that someone was outside of
6 scope of their employment, or something like that.

7 THE COURT: I just don't understand the different
8 theory of how Zimmerman could possibly not be liable for Count
9 One but, instead, be liable for Count Two or Count Three.

10 MS. GAIL: We can agree with that. If Zimmerman is
11 liable for Count One, the other ones are necessary.

12 THE COURT: If Zimmerman is not liable for Count One,
13 how is Zimmerman going to believe liable for Count Two or
14 Three?

15 MS. GAIL: Because she could have aided and abetted
16 other people's direct violations. She could have substantially
17 assisted something --

18 THE COURT: Why isn't that subsumed under Count One?

19 MS. GAIL: Because there is an added element of -- she
20 doesn't have to have done the act. The person in the
21 conspiracy to rob the bank doesn't have to be the shooter.

22 THE COURT: That's true. But they still are guilty of
23 bank robbery.

24 MS. GAIL: Not if they were at home and weren't
25 involved in the actual robbery. They just bought the getaway

car and then delivered it. If you could prove that they bought the getaway car to do it, you would have a substantial assistance or aiding and abetting.

THE COURT: Give me an example of what a theory would be that Zimmerman -- let me put the easiest one to rest. What possible theory could you have against Fox News as an entity that would make a distinction between Fox News as an entity not being liable under Count One, but being liable under Two or Three.

MS. GAIL: It's what I alluded to. If Fox took the position, which I hope they don't, that Zimmerman was somehow acting outside the scope of her responsibility --

THE COURT: That's Zimmerman's liability. That's not Fox's independent liability. You have Fox as directly liable under Count One.

MS. GAIL: We have pleaded it and we will prove that. What I'm saying is, you can envision a world where having proven that Fox's liability is because of its employee, because of Zimmerman, Fox takes the position, we are not responsible for Zimmerman's actions because she was outside the scope of her employment. And in that world we can get Fox's culpability for Zimmerman's acts through aiding and abetting, through conspiracy, and through negligent supervision. That's literally what we are after, your Honor.

THE COURT: What is your conspiracy theory? What is

1 the conspiracy between Zimmerman and Fox that you're alleging?

2 MS. GAIL: We don't believe --

3 THE COURT: What is your factual allegations to
4 support a conspiracy?

5 MS. GAIL: She coordinated with her Fox --

6 THE COURT: With who?

7 MS. GAIL: We don't have any names.

8 THE COURT: What basis do you have to say she
9 coordinated with someone if you don't know that she coordinated
10 with a person?

11 MS. GAIL: She references what her Fox producers know
12 about or are interested in. She tells Wheeler, for example, my
13 Fox producers are going to be disappointed if you do X. That
14 is an inference that she has coordinated or following the
15 directions of her producers, that they know what she is doing.

16 THE COURT: Why wouldn't that make them liable under
17 Count One?

18 MS. GAIL: I think it would, Judge.

19 THE COURT: I am just trying to understand. It's
20 difficult for me to understand how on these facts they can be
21 found not liable on Count One under your theory but liable on
22 Count Two.

23 MS. GAIL: I think it is horribly unlikely. I have
24 given you the one scenario that I know I had in mind.

25 THE COURT: I have a board of judges meeting at 1:00,

1 so we are going to have to continue this afternoon. Let's
2 start, we will go a few minutes, and we will continue at 2:15.
3 I'll give you a full opportunity.

4 MR. SUBRAMANIAN: Your Honor, I want to start with the
5 question you had on the facts. I agree with Mr. Gail that a
6 lot of the questions that we have been raising today are
7 factual questions in the absence of a full record.

8 But I do want to go to your point, where are the
9 allegations, because you make a good point. You say, look,
10 intentional infliction of emotional distress. When is that
11 emotional distress suffered? At what point does that start?
12 You are absolutely right. It's when the whole scheme is
13 revealed to the Riches.

14 That happens when the articles are published because
15 in those articles they are premised on the fact that Rod
16 Wheeler is a Fox contributor, but also was serving as the
17 Rich's private investigator.

18 That's when the Riches understand that the guy that
19 they hired that Ed Butowsky brought to them saying, hey, we are
20 both Jewish, you should trust me, I am trying to help you find
21 closure by actually pushing someone forward to investigate and
22 find the murderer that that was all a lie.

23 When Mr. Gail said it's the whole course of conduct,
24 just to put a fine point on it, the injury is suffered in May
25 of 2017, but that's when they realized all of these things that

happened in the preceding months, it was all a sham. Your Honor, it's something that I would regard as outrageous, I believe a member of the jury can find to be outrageous, but we are not even at that stage. We are at the complaint stage.

So in terms of the injury, you are right, it starts in May of 2017, because that's when the articles were published, that's when they realized what happened. But doesn't mean you blind yourself to the conduct --

THE COURT: They realized what happened. What did they realize? How do you articulate --

MR. SUBRAMANIAN: I know you have that long timeline. Let's be a little bit concise about it.

In December of 2016, that's when Ed Butowsky first reaches out to Joel Rich, to say, hey, we are members of the Jewish community. We should talk.

It is coincidental that the agreement, the Fox contributor agreement with Mr. Wheeler that is in the record, it's Exhibit 11 to the Terry declaration, is dated December 2016. I think that the discovery is going to show in this case that that is when the scheme was hatched. Rod Wheeler was going to be planted within the Rich family to turn fiction into fact for this story. That's the first kind of concrete, if you want to kind of say, here is a point in time. December 2016.

Then fast forward to February of 2017. That's when Butowsky, on the same day as having a meeting with Malia

1 Zimmerman and Rod Wheeler, so they are all just sitting there
2 talking. That's the conspiracy, that's the aiding and
3 abetting. That's the genesis of this scheme.

4 THE COURT: I'm sorry. Who was involved in this
5 conspiracy at this point?

6 MR. SUBRAMANIAN: Butowsky, Zimmerman, and Wheeler are
7 meeting in February of 2017. That's alleged in our complaint.
8 It's at paragraph --

9 THE COURT: Which date is that on your timeline?

10 MR. SUBRAMANIAN: It should be February 2017. I can
11 give you the particular paragraph numbers.

12 THE COURT: Do you have a date?

13 MR. SUBRAMANIAN: February 23, 2017.

14 THE COURT: 2017.

15 What page is that on?

16 MR. SUBRAMANIAN: Paragraph 34 of the complaint.
17 That's when Butowsky sends Wheeler a text message and says, I'm
18 working on this article and says I'm working with Malia
19 Zimmerman at Fox News on an article regarding Seth -- that's
20 the following paragraph, 35 -- and that he wants to enlist
21 Wheeler to conduct an investigation into Seth's murder.

22 THE COURT: Again, you are not saying that that's
23 outrageous conduct. You are saying that that evidences some
24 outrageous conduct.

25 MR. SUBRAMANIAN: I want to connect this to the case

law because your Honor asked about the case law. And what the cases say is you look at the totality of the circumstances and many of the cases where IIED liability is found say, is there a campaign at work. Was there a campaign that was targeted against the plaintiffs in the case? And if you can show that there was a campaign, that can rise to the level of outrageous conduct.

When you were engaging in the colloquy about whether, well, if you just lie to someone, would that be outrageous conduct, you are probably right that that by itself wouldn't be outrageous conduct. If that's all we had in this case, we probably would not be here.

THE COURT: Summarize for me or point me in the complaint where the outrageous conduct is articulated. What do you claim is the outrageous conduct?

MR. SUBRAMANIAN: I can give you by dates first and then --

THE COURT: I need you to summarize it in a sentence.

MR. SUBRAMANIAN: In a sentence, it is planting Rod Wheeler as a fictitious private investigator to work for the Riches when he is a Fox contributor whose only purpose is to manufacture a story that Mary and Joel Rich's son, Seth Rich, who just recently died, was responsible for treason.

THE COURT: Is there a place in this complaint where it is articulated that way?

1 MR. SUBRAMANIAN: I believe so.

2 THE COURT: Is there a paragraph that articulates it?

3 MR. SUBRAMANIAN: I believe so. I think the initial
4 introductory paragraphs, if you look at paragraphs 1 through 6
5 of the complaint, that gives the overview summary of what we
6 believe to be the outrageous conduct.

7 THE COURT: Can you quote a line that will sound
8 outrageous?

9 MR. SUBRAMANIAN: Sure.

10 THE COURT: Which paragraph?

11 MR. SUBRAMANIAN: Paragraph 3.

12 THE COURT: Which language?

13 MR. SUBRAMANIAN: If you look at paragraph 2,
14 paragraph 2 says: The defendants induced Joel and Mary, Seth
15 Rich's parents, to hire Rod Wheeler, a purportedly independent
16 investigator, to help quote/unquote solve your son's murder.

17 THE COURT: You say paragraph 2.

18 MR. SUBRAMANIAN: Paragraph 3. I'm sorry.

19 THE COURT: Which sentence?

20 MR. SUBRAMANIAN: Sentence 2 in paragraph 3.

21 THE COURT: Read that for me one more time.

22 MR. SUBRAMANIAN: Defendants induced Joel and Mary,
23 Seth Rich's parents.

24 THE COURT: Do you have an amended complaint or
25 complaint?

1 MR. SUBRAMANIAN: There is only one complaint.

2 THE COURT: I don't see the paragraph 3.

3 MR. SUBRAMANIAN: Your Honor, may I approach. I can
4 hand you a copy.

5 THE COURT: I'll show you what I have and then we will
6 take a break.

7 Am I looking at the right document?

8 MR. SUBRAMANIAN: That's the right one.

9 THE COURT: Just mark where you read from. Which
10 paragraph are you marking?

11 MR. SUBRAMANIAN: Paragraph 3 for the record.

12 THE COURT: Hand me that back again and just read that
13 back to me again, and then let's take a break.

14 MR. SUBRAMANIAN: Your Honor, just for the record --

15 THE COURT: I think you were paraphrasing it.

16 MR. SUBRAMANIAN: I inserted words, just for clarity.

17 THE COURT: Read it word for word.

18 MR. SUBRAMANIAN: Paragraph 3, sentence 2. They
19 induced Joel and Mary, his parents, to hire Rod Wheeler, a
20 purportedly independent investigator.

21 Moving to the second page, help solve their son's
22 murder. Defendants worked with Wheeler to pursue and develop a
23 fiction that Seth had leaked thousands of DNC e-mails to
24 WikiLeaks and they published, republished, and publicized the
25 sham story which they knew would be covered again and again and

republished here and around the world, painting Joel and Mary's son as a criminal and a traitor to the United States.

THE COURT: Let's take a lunch break. Let's say 2:20 and we will continue at that time.

(Luncheon recess)

MR. SUBRAMANIAN: Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. SUBRAMANIAN: May I proceed with argument?

THE COURT: Sure.

MR. SUBRAMANIAN: Where we last left we were talking about some particular allegations of the complaint that you can look at to really nail down what the outrageous conduct was.

I have pointed to paragraph 3 of the complaint. I just wanted to give you two additional paragraphs to look at, which are paragraph 4, which is a paragraph right after 3, that says: Defendants also intentionally made it appear that Joel and Mary were involved in and confirmed the substance of this smear campaign.

THE COURT: And what activity or conduct is that referring to?

MR. SUBRAMANIAN: For that we turn to paragraph 136, which puts a finer point on it. This is a list of the things that we believe are outrageous, but I want to focus the Court on paragraph C. And paragraph C says: Butowsky and Wheeler induced Joel and Mary, by false and misleading statements, and

by omissions, to unwittingly participate in the defendants' scheme by contracting with Wheeler to help solve their son's murder and to implicate themselves as parents who had commissioned Wheeler, inferring that they were involved in establishing the fictitious facts of defendants' scheme and sham story.

THE COURT: I am not sure I understand what that means. If I hire someone to build a house and the house falls down, how am I complicit in building a bad house.

MR. SUBRAMANIAN: I think that's a different example. What happens here is that the defendants in this case, all of them, not just one particular one, have to do some alchemy. They have to turn a conspiracy theory, fiction, into fact. And the way they decide they want to do this is by planting an investigator with the Riches who, by virtue of his position as a spokesman and representative of the family, has insider access. And that's why in the three articles that they publish they say Rod Wheeler, an investigator for the family, confirms that Seth Rich sent these e-mails.

THE COURT: I don't understand how that implicates the Riches. The Riches hired him to do an investigation. They didn't do the investigation personally. They have no idea whether the investigation is conducted appropriately or not. They have just hired this person who has come up with results.

MR. SUBRAMANIAN: Because the way that it's actually

portrayed is that well, look, the parents' own investigator has said this, so it must be true.

THE COURT: No. I don't understand that. Why would that be so? It's just the opposite. What you are saying is the parents hired this person thinking this person was going to do a good job, and the person duped them. In what way does one assume that they hired someone to do a fake story to defame their son? That doesn't make any sense. They would never participate in that. No one would assume that they would do that.

MR. SUBRAMANIAN: Your Honor, I couldn't agree more that no one would ever do that.

THE COURT: How is that the outrageous conduct that they did something to imply that the Riches gave their good housekeeping seal of approval to the conclusions of Wheeler simply because they hired Wheeler? You say that they hired Wheeler and they were duped.

The conclusion you want to draw in that regard is the least likely conclusion, that the Riches would hire somebody who is going to do a fake story that is going to be damaging to them and going to defame their son. That's not a logical conclusion. Isn't that what that paragraph says?

MR. SUBRAMANIAN: What that paragraph says, this is what the defendants were trying to do. The way that they were portraying Rod Wheeler in the stories was that he was a

1 representative of the family. He was their investigator.

2 THE COURT: But that's true. That's true. They did
3 hire him and he was their representative. It's just that you
4 claim he didn't do what he was hired to do.

5 MR. SUBRAMANIAN: He was planted there to manufacture
6 the story. If you assume --

7 THE COURT: How could the damage be damage that you
8 attribute to somehow they were damaged by the public believing
9 that they set themselves up? I don't understand that theory.

10 MR. SUBRAMANIAN: I think the question to ask is,
11 would it be outrageous to use the grieving parents of someone
12 who has been killed as the pawns, as the instruments in
13 implicating their son of a high crime?

14 THE COURT: I understand that theory in general, but
15 that's not the language you just read to me. The language you
16 just read to me, you are saying, what they did that was
17 outrageous is to make people think that somehow the Riches were
18 complicit in their own demise, right? That's not a reasonable
19 conclusion for anybody to draw, that they would be complicit in
20 trying to make themselves and their own son look bad. That
21 couldn't be the outrageous conduct that caused their injury.

22 MR. SUBRAMANIAN: No one could ever believe that.

23 THE COURT: Isn't that what you say?

24 MR. SUBRAMANIAN: Because no parent would ever say
25 that.

1 THE COURT: But you say that that's what occurred.

2 MR. SUBRAMANIAN: That's one of the things that's
3 here.

4 THE COURT: I am just saying, as one of the things
5 that's here, that doesn't make any sense as a factual or a
6 reasonable consequence of their claim.

7 MR. SUBRAMANIAN: Your Honor, I hear you on that. I
8 think just feeding off what you said, you had indicated I get
9 you the fact that they were using the parents as pawns or
10 instruments of what they were doing, that I could understand,
11 and that's what's alleged if look up two paragraphs in 136A.

12 THE COURT: That's a different allegation. That's a
13 different allegation. The allegation that you just read to me,
14 the most reasonable conclusion to draw is they were duped by an
15 unscrupulous investigator, not that they were complicit in the
16 story that they claim is not true, and they claim they had no
17 idea that he was going to say those things, and no one would
18 reasonably believe that they would be part of a scheme to put
19 out this story about their son simply because they hired
20 Wheeler. At worst, they were foolish, as they say, if there is
21 going to be some bad consequence or some public scorn with
22 regard to their involvement. It wouldn't be that they
23 intentionally tried to get him to write a bad story about them
24 and their family member, but they were in fact duped.

25 MR. SUBRAMANIAN: I understand that and I don't want

to fight what your Honor is saying. I think that that's right. I think that that underscores the outrageousness. But as we point out, the point about using the parents as pawns and instruments, I think a reasonable juror could find that to be outrageous.

THE COURT: They would use these pawns because --

MR. SUBRAMANIAN: Because, again, the only reason that this story gets published, just to be clear about it, there have been -- and the defendants actually make this point. The Seth Rich conspiracy theory was out there, but Fox needed to turn fiction into fact. They needed a way to say that not only is this a conspiracy theory, it's true, and that's why they do this. That is why, starting in December of 2016, they engage in this scheme to have Wheeler hired by the Riches. And hell or high water, Rod Wheeler was going to deliver quotes for articles that would say, I have found the evidence that Seth Rich sent these e-mails.

THE COURT: I am still trying to understand whether or not what you claim is the outrageous conduct that caused their injury was the hiring of Wheeler or the content of the published article.

MR. SUBRAMANIAN: It is both, but it's primarily what happens before the article because that is the reason why the article is published at all.

Just to be very clear, your Honor, imagine another

world, the alternative world where all we have is an article about Seth Rich, that that's all that the defendants did, that there was no scheme before the article. There is no Rod Wheeler, who says he's an investigator for the family. There is just an article about Seth Rich. I don't think we are here in front of you, your Honor.

THE COURT: Regardless of what that article said.

MR. SUBRAMANIAN: Right.

THE COURT: How can that be the basis, an alternative basis for your lawsuit?

MR. SUBRAMANIAN: It's not an alternative basis.

THE COURT: You just said that if somebody else who wasn't hired by the Riches had made these same statements you wouldn't have a claim.

MR. SUBRAMANIAN: It goes straight to what the law says. The law says, and I want to turn to the law because we have been talking a lot about the facts without actually discussing what the cases have said about intentional infliction of emotional distress.

What they say is, speech alone may be one basis for a claim, but you have to look at the totality of the circumstances. You can't take out the actual article from what we are talking about because the conduct of the defendants that preceded that article is what caused the article to be printed.

You can't say, well, look, if I just think about what

1 happened on one day and then forget about everything else, even
2 if it was a coordinated campaign, then I don't think that's
3 outrageous, so I am just going to X it out and then move on to
4 the next day. That's not how the analysis works in these
5 cases. It's precisely why this is a fact-based question that
6 really should go to summary judgment when we have all the facts
7 in the record.

8 But what the courts do is to look at the totality of
9 the facts.

10 THE COURT: What point does it become outrageous
11 conduct? What takes it from the area of bad behavior,
12 negligent behavior, common behavior? When it gets to this
13 point all of it becomes outrageous conduct. What on your
14 chart? At what point does it become outrageous conduct?

15 MR. SUBRAMANIAN: Do you mean in terms of the facts of
16 this case or in terms of the law?

17 THE COURT: In terms of the facts of this case.

18 MR. SUBRAMANIAN: I think that at the point that the
19 defendants conspired to have Wheeler hired for the purpose of
20 the article, that renders their conduct outrageous, at the very
21 least, and we have obviously alleged more than that.

22 But I think that, your Honor, what I directed you to
23 in paragraphs 3 and 4, if you look at those two paragraphs
24 together and you think about the idea that they were using the
25 parents as pawns --

1 THE COURT: What's the most representative paragraph
2 that lays that out?

3 MR. SUBRAMANIAN: I told you about paragraphs 3 and 4.
4 The portion of the complaint that actually walks through what
5 we believe to be outrageous conduct is paragraph 136 and there
6 are several itemized subheadings there that walk through the
7 conduct. I know your Honor was looking for one sentence as
8 opposed to kind of a list of items. I want to get to the law
9 because I think that, in fairness, what the law requires the
10 Court to do is to actually look at the totality of the facts.

11 THE COURT: You don't cite me a case, nor do I know of
12 a case that has a list of 20 items that they say constitute
13 collectively the outrageous conduct. Most cases can clearly
14 specifically articulate what kind of and what actual conduct by
15 the defendant is the outrageous conduct.

16 MR. SUBRAMANIAN: Absolutely.

17 THE COURT: I usually don't have to add up 20 things
18 to figure out if the first 10 are the outrageous conduct or it
19 has got to be 19 of the 20 or it's got to be all 20.

20 MR. SUBRAMANIAN: Your Honor, we think that the
21 defendants failed a lot here, but you don't have to add up all
22 of those allegations in this case. I can make it really easy
23 for you because it's in paragraph 3 and 4. The defendants
24 conspired to have Wheeler planted with the Riches so that he
25 could be a mouthpiece for this false story, which is

1 subsequently published, and falsely accuses Seth Rich of being
2 the source of the WikiLeaks. It's that sentence, your Honor.

3 THE COURT: Is there any allegation in this complaint
4 or any reason to conclude that Zimmerman and Butowsky had a
5 conversation about the Riches hiring Wheeler before Wheeler was
6 hired?

7 MR. SUBRAMANIAN: Yes, your Honor.

8 THE COURT: What is that information and belief?
9 Because I'm not aware of a particular fact in this whole
10 scenario that puts Zimmerman and Butowsky together prior to the
11 Riches hiring Wheeler.

12 MR. SUBRAMANIAN: That's not true, your Honor.

13 THE COURT: That's what I'm asking.

14 MR. SUBRAMANIAN: Absolutely. I will help you with
15 that.

16 THE COURT: Is there such an allegation in this
17 complaint?

18 MR. SUBRAMANIAN: Yes, your Honor. If we turn to page
19 5 of the complaint, because the complaint is told in a kind of
20 chronological format. Part 4 is entitled Butowsky and Fox's
21 Zimmerman seek out Joel and Mary to mainstream the sham story.

22 THE COURT: Where does it say that Zimmerman had
23 something to do with it?

24 MR. SUBRAMANIAN: If you turn into page 7, that's the
25 right section. If you looked at that section after the

hearing, you would see kind of all the allegations.

Turn to page 7. Then you see at paragraph 35 that on February 23, 2017, we know that date because of the preceding paragraph, Wheeler has described that he called Butowsky and that Butowsky stated that he was working with Zimmerman at Fox News on an article regarding Seth and that he wanted to enlist Wheeler to conduct an investigation into Seth's murder.

You see the next paragraph, 36. On information and belief, Butowsky, Fox's Zimmerman, and Fox News sought to engage Wheeler to help advance and further publicize the sham story that Seth was responsible for giving the DNC e-mails to WikiLeaks.

THE COURT: Except that that group pleading is an insufficient pleading with regard to any individual defendant. That's the same as saying defendants. You don't tell me who did what.

MR. SUBRAMANIAN: It goes on. Paragraph 37.

THE COURT: It may go on, but I am not sure what 36 is supposed to be referring to. Is 36 only referring to 37 or is there some of that activity that you are trying --

MR. SUBRAMANIAN: I am going to give you individualized noninformation and belief paragraphs.

THE COURT: I am trying to figure out what you are referring to and who you are referring to in 36.

MR. SUBRAMANIAN: 36 says that Butowsky Fox's

1 Zimmerman and Fox News sought to engage Wheeler.

2 THE COURT: What does that mean?

3 MR. SUBRAMANIAN: That they conspired. They were
4 talking together to engage Wheeler.

5 THE COURT: What facts are you referring to to base
6 that conclusion on?

7 MR. SUBRAMANIAN: I think at this stage we don't have
8 discovery.

9 THE COURT: I am not asking about discovery. Are you
10 saying that you think that there was a meeting? How do you
11 seek to engage Wheeler? Who did what to seek to engage
12 Wheeler? That's all I'm asking.

13 MR. SUBRAMANIAN: I want to get off this paragraph.

14 THE COURT: You took me to that paragraph, so I want
15 to understand it.

16 MR. SUBRAMANIAN: I think before we have discovery,
17 the rule in the Second Circuit is very clear that you can plead
18 on information and belief allegations --

19 THE COURT: If you have a basis for the information
20 and belief, and you can't group plead. If you want to say, on
21 information and belief, a little birdie told me they had a
22 meeting downtown, that's one thing, but that's not what this
23 says. This is the most conclusory group pleading as you can
24 possibly have in a paragraph. It basically says that the
25 defendants sought to engage Wheeler. What does that mean?

1 Sought to engage Wheeler is not a fact, right?

2 MR. SUBRAMANIAN: Let me get onto the next paragraph.
 3 I don't want to linger on that. I will give you the basis for
 4 the information and belief. Paragraph 37 says: Wheeler
 5 confirms that on February 28, 2017, right after Butowsky told
 6 Wheeler that he was working with Zimmerman, Wheeler met with
 7 Butowsky and Fox's Zimmerman at a restaurant on Capitol Hill in
 8 Washington, D.C. Next paragraph, 38: Wheeler also confirms
 9 that Butowsky advised Wheeler that Zimmerman was an
 10 investigative journalist.

11 THE COURT: I'm sorry. What paragraph?

12 MR. SUBRAMANIAN: 38.

13 THE COURT: Wheeler also confirms. Go ahead.

14 MR. SUBRAMANIAN: Here is the kind of climax here. If
 15 you turn the page to paragraph 41, on the very same day that
 16 Wheeler met with Butowsky and Fox's Zimmerman at the Capitol
 17 Hill restaurant, Butowsky sent an e-mail to Joel Rich offering
 18 to hire Wheeler, who he portrayed as an independent private
 19 investigator, on Joel and Mary's behalf.

20 Paragraph 42: According to Wheeler, Butowsky told
 21 Wheeler that in talking to Joel and Mary, he should make sure
 22 to play down Fox News. Don't mention you know Zimmerman.

23 THE COURT: I am not quite sure why that's in
 24 brackets.

25 MR. SUBRAMANIAN: I think because her is probably her,

1 and we changed it to Zimmerman for clarity.

2 Your Honor, this complaint is subject to 8(a) notice
3 pleadings standards. Even if this complaint were subject to
4 the heightened requirements of Rule 9(b), it would pass muster
5 on the point that your Honor just raised.

6 THE COURT: Are you alleging there is any involvement
7 as a representative of Fox News other than Zimmerman or
8 Butowsky?

9 MR. SUBRAMANIAN: Meaning are we alleging that Fox
10 News itself had an involvement in these initial acts?

11 THE COURT: You are alleging that.

12 MR. SUBRAMANIAN: Absolutely.

13 THE COURT: I am trying to figure out, are you
14 alleging that through which individuals? Just Zimmerman and
15 Butowsky, or are you trying to say that you think -- let's put
16 it this way. If Zimmerman is the representative of Fox, she
17 can't conspire with herself. So I'm trying to understand who
18 you say that is involved in this conspiracy. Which
19 individuals? Butowsky, Zimmerman, and who?

20 MR. SUBRAMANIAN: Let's be very clear about it. The
21 particularized allegations that I just pointed the Court to
22 involve Zimmerman, Butowsky, and Wheeler.

23 THE COURT: In what way do you say Fox News is liable,
24 through Zimmerman's conduct or through some other third
25 person's conduct?

1 MR. SUBRAMANIAN: On two bases. First of all, Fox
2 News is not disputing that Malia Zimmerman is their agent.

3 THE COURT: I am trying to understand your theory.

4 MR. SUBRAMANIAN: That's one basis.

5 THE COURT: It is Zimmerman, not some third party.

6 MR. SUBRAMANIAN: That is one basis --

7 THE COURT: Slow down. I'm not asking you whether
8 it's one basis. You're either alleging that Zimmerman
9 conspired with Butowsky and Wheeler or you are alleging that
10 Zimmerman conspired with Butowsky, Wheeler, and some other Fox
11 News agent. Which is it?

12 MR. SUBRAMANIAN: Maybe I'm not understanding the
13 question.

14 THE COURT: Who is Fox News? That's all I'm asking.
15 Who do you claim is Fox News? Do you claim that's just
16 Zimmerman or you claim that that's some third representative?

17 MR. SUBRAMANIAN: No, your Honor. That's what I was
18 getting to. If I can kind of walk through this.

19 THE COURT: You can answer that first. That's a
20 simple question. You don't have to walk me through anything.
21 Are you saying that there is a third person that they are
22 conspiring with, or when you say Fox News, you're referencing
23 Zimmerman?

24 MR. SUBRAMANIAN: Both.

25 THE COURT: Can't be both. It can't be both. It's

1 one or the other.

2 MR. SUBRAMANIAN: It can be both.

3 THE COURT: It can't be both. Are you alleging that
4 there is another person who is conspiring with Zimmerman that
5 is a Fox representative, yes or no?

6 MR. SUBRAMANIAN: The complaint does not identify
7 another person.

8 THE COURT: I didn't ask you whether you identified a
9 person. You are not listening to my question. The question is
10 not a trick question. I am just trying to get some information
11 from you.

12 Are you alleging that Zimmerman is conspiring with
13 some other individual, unnamed individual, unknown individual
14 at Fox News?

15 MR. SUBRAMANIAN: Yes, your Honor.

16 THE COURT: What is that person's role?

17 MR. SUBRAMANIAN: Our allegation, our understanding at
18 this time and our expectation of what discovery is going to
19 show is that Fox News, the company, was involved in this
20 preceding conduct, the development of this article.

21 THE COURT: But the company is a fiction. The company
22 doesn't talk. It doesn't act. Someone acts on behalf of the
23 company, and I'm trying to understand whether you are saying
24 that there is some unknown person out there that you claim is
25 Fox News and is acting on Fox News' behalf or you're

1 attributing those to Zimmerman as being that sole person.

2 MR. SUBRAMANIAN: Right. Your Honor, I want to make
3 sure to directly answer your question. In terms of who the
4 other person might be, that would be something that would be
5 revealed in discovery.

6 THE COURT: But you claim there is another person? Is
7 that your theory?

8 MR. SUBRAMANIAN: At the very least, your Honor. As I
9 mentioned earlier in my argument, in Exhibit 11 to the Terry
10 declaration, we have the Fox contributor agreement. The Fox
11 contributor agreement is dated December 2016, at the beginning
12 of my timeline. That's where Fox actually signed an agreement
13 with Rod Wheeler that says, you can only talk to us. You can
14 only deal with us. That agreement is signed by the copresident
15 of Fox News Network. I am not sure. There is no name here,
16 but it is signed by that person. So there is at least one
17 other person that we would want to get discovery on to further
18 understand the facts. That's just the factual question.

19 THE COURT: But you don't allege that that person is
20 at this point a person that you claim is part of this
21 conspiracy?

22 MR. SUBRAMANIAN: We do not identify that person by
23 name in the complaint, no. That would be something that I
24 think discovery would show the full extent of this conspiracy.

25 THE COURT: Regardless of who this person might be, do

1 you have any evidence that there is another living human being
2 who is responsible on behalf of Fox News for the claims that
3 you allege?

4 MR. SUBRAMANIAN: I believe that the person who signed
5 this --

6 THE COURT: That's what I'm asking. That's the
7 theory --

8 MR. SUBRAMANIAN: The copresident of Fox News who in
9 December 2016 signed up Rod Wheeler.

10 THE COURT: You are saying that person had what
11 knowledge and intent.

12 MR. SUBRAMANIAN: I believe that discovery will show
13 that that person had the intent that Rod Wheeler would be the
14 kind of person who would feed into the story.

15 In addition to that, the complaint actually alleges
16 that around the time of the article -- so the article comes out
17 on May 15, 2017. There certainly were Fox producers who were
18 involved in the decision as to what Rod Wheeler should or
19 shouldn't do and whether to go forward with the story and
20 that's something that is alleged in our complaint. We don't
21 have the names of those people in our complaint --

22 THE COURT: What's in the complaint? What paragraph
23 are you referring to?

24 MR. SUBRAMANIAN: Your Honor, if you turn to paragraph
25 74. Paragraph 74 says: According to Wheeler, on May 15, 2017,

Fox's Zimmerman called Wheeler and told him, the bosses at Fox want her to go with the Zimmerman Fox article the next day, and Butowsky left Wheeler a voice mail telling him to close this deal, whatever you got to do. And when the local Fox affiliate tries to go forward with a story to sort of preempt the Fox News story. What Wheeler says is, wait, I need to check with Fox News producers in New York. That's in paragraph 76, if you look at That.

Then, on paragraph 77, it says --

THE COURT: Your position is that the people who he is referencing here are coconspirators in the intentional infliction of emotional distress.

MR. SUBRAMANIAN: Absolutely. I believe they absolutely could be.

Your Honor, you asked me if I had evidence. Again, we are at the pleading stage. I don't have any discovery from Fox. In fact, this Court has stayed discovery, pending this hearing.

THE COURT: Discovery and evidence are two different things.

MR. SUBRAMANIAN: Discovery is where you get the evidence from.

THE COURT: No. You have to have some evidence to file a complaint. You can't just make it up. You have to have facts. That's all I'm asking you about.

1 MR. SUBRAMANIAN: I guess my point is, when you are
2 asking me what the allegations are, I am trying to be candid
3 with the Court, but I want the Court to understand that the
4 full dimensions of this conspiracy are going to be filled out
5 during discovery because that's when we are going to get the
6 actual documents from Fox, from Malia Zimmerman, the texts
7 between them that actually show what they were doing, and the
8 discovery is going to show how high up at Fox this went and how
9 early on. People at Fox were thinking, I've got an idea, how
10 do we turn this fictional story into fact? Let's go after the
11 parents.

12 If your Honor has further questions about this, I'm
13 happy to answer.

14 THE COURT: I'm not clear on what you say their intent
15 was with regard to the Riches. You are not arguing that they
16 did it to just hurt the Riches.

17 MR. SUBRAMANIAN: They had a motive to publish the
18 story.

19 THE COURT: The motive was not to hurt the Riches.

20 MR. SUBRAMANIAN: They understood that that would be
21 an effect.

22 I want to start talking about the law because I have
23 not been able to talk about what the actual cases say. I think
24 talking about the cases will actually reveal why the
25 defendants' arguments kind of don't hold up here.

Turning to the question of intent that you have raised, the standards for an intentional infliction of emotional distress claim is not just where you have the sole intent to harm the plaintiff because, of course, people do a lot of outrageous things when they have their own motives to do so. But they often do that knowing that it's going to injure somebody. That's what the law says. Either you have the intent to harm somebody or you disregard the risk that your conduct will cause someone harm, and the cases are very clear about that.

Given that that's the standard, I think the fairest, what we know now is that, at the very least, there was a disregard of the risk that the defendants' conduct would harm Joel and Mary Rich. That's just on the question of intent.

THE COURT: It's more than negligence.

MR. SUBRAMANIAN: It's more than negligence. This is not negligence, by any stretch. Assuming the allegations in the complaint as true and taking every inference in our favor, there is no way you can call this negligence. I think that this is outrageous. When you think about what happened, doing what they did to the parents of a child who just died, using them as pawns to put forward a false narrative that their son was responsible for this crime, I think that's outrageous and it's far beyond many of the cases where intentional infliction of emotional distress claim have been sustained, including

1 after the Court of Appeals decision in *Howell*. If I can move
2 to those cases.

3 THE COURT: Just so we can put that aside, I found no
4 case that would sustain an intentional infliction of emotional
5 distress based on defamatory statements about the deceased.

6 MR. SUBRAMANIAN: I don't think that's true.

7 THE COURT: You have such a case?

8 MR. SUBRAMANIAN: Absolutely.

9 THE COURT: Which case?

10 MR. SUBRAMANIAN: In the *Holloway* case that we cite in
11 our complaint, which is decided under Alabama law, but the same
12 standard that is applicable in New York, the issue there was
13 Natalee Holloway, she went missing in Aruba, I think, and no
14 one knows what happened to her. Her mother sued the National
15 Inquirer for printing stories about her death and where her
16 remains were buried.

17 The Court looked at those allegations and said, this
18 is enough at this stage of the case to move forward, and that's
19 much less severe than what we are talking about here because in
20 *Holloway* the only conduct -- when you asked me what the conduct
21 was, the only conduct in that case was the speech. It was a
22 pure speech case. There was no allegation the National
23 Inquirer had tried to dupe the mother into kind of saying like,
24 my daughter is very good. There was none of that. It was just
25 about the article. The Court there sustained the intentional

1 infliction of emotional distress claim. That case is cited in
2 our brief.

3 Let me give you some more examples. The *Roach v.*
4 *Stern* case. That case that was a appellate decision that
5 postdates the Court of Appeals' decision in *Howell*. In that
6 case there is no long-term campaign. There is no like history
7 of conduct that we are talking about here.

8 It's the Howard Stern show and they received the
9 cremated remains of the plaintiffs' sister, I believe, and they
10 have a segment where they sort of talk about kind of
11 mistreating the remains and stuff that's nasty, but I think is
12 less severe than what we are talking about in this case. And
13 there the Court says, intentional infliction of emotional
14 distress claim is sustained.

15 There is the *Esposito-Hilder* case. That's another New
16 York appellate case that postdates the Court of Appeals
17 decision in *Howell*. In that case it's a radio segment where
18 the radio guys pull up a newspaper and then they look at the
19 bridal announcements, and they basically talk about how ugly
20 the brides are. That's literally what the case is about. And
21 they identify one particular person who is a competitor and
22 they say, they identify her by name. They really go into depth
23 on it, and the Court says you have an intentional infliction of
24 emotional distress claim there.

25 And because in their reply brief Fox said, well, there

is not really a lot of cases in New York after *Howell* that are kind of comparable to this case, I did some searching last night just to see if I could find something. And what I found was a 2004 First Department case called *164 Mulberry Street Corp. v. Columbia University*, and the citation is 4 A.D. 3d 49.

Your Honor, if I could approach just to hand up a copy of this case.

THE COURT: Yes.

MR. SUBRAMANIAN: Your Honor, in this case, which was decided on a motion to dismiss, the conduct at issue -- your Honor was talking about the outrageous conduct -- the defendant in the case was a researcher with Columbia and he wanted to put together a study that said, what do restaurants do when you send them letters saying that you got food poisoning? What is their response usually? He sends out these letters and he says, I am not going to contact any governmental parties, but I got food poisoning at your restaurant. I hope you respond appropriately.

That's pretty much the end all of what the defendant did. And the Court says, well, that's enough at this motion-to-dismiss stage of the case, and the Court points to the fact that his letters, even though they were sent to different people, different possible plaintiffs, that constituted a campaign of harassment. And because that was a campaign, the court said, that makes it more like an

intentional infliction of emotional distress case.

Here we have a campaign that's directed just against the plaintiffs in this case. Now, importantly, what the Court in the *Mulberry Street* case said is, look, this is a motion to dismiss. We don't have all the facts in the record. Let's let this case proceed to the summary judgment stage.

I think the *Mulberry Street* case is informative because it shows that conduct much less severe than is at issue here has been let to go past the motion to dismiss stage.

I would also note one additional thing, which is, after the letters were sent to these restaurants, the researcher actually followed up and said, actually, I was lying. I'm sorry. I'm a researcher. I thought this that this would be a good idea for a study. It's not. I am not going to do it. And then the business school apologized as well. The Court in its opinion even recognized that there was no malice against the restaurants because he was just doing a study. There is no malice against the plaintiffs, as there is in this case, but the Court said, the defendant should have realized that his actions would have caused harm, and that's why the case was allowed to get through.

Let's keep it going because this is such an important issue in this case. What is the standard for outrageousness? Again, after the Court of Appeals' decision in *Howell*, the Third Department, in a case called *Gill Farms v. Darrow*, that's

1 256 A.D.2d 995.

2 Your Honor, may I approach just to hand up this case?

3 THE COURT: Yes.

4 MR. SUBRAMANIAN: Your Honor, this case has to do with
5 defendants' complaints to public agencies about the plaintiff's
6 use of pesticides. That was found outrageous enough to sustain
7 a claim, at least at this stage of the lawsuit.

8 THE COURT: Those aren't comparable facts.

9 MR. SUBRAMANIAN: I agree they are not comparable only
10 because they are so --

11 THE COURT: They intentionally engaged in a course of
12 conduct making false complaints to government entities designed
13 to interrupt the operations of plaintiff's business. That's
14 not the circumstance that's comparable here. You may think
15 it's worse, but it's not the same. It's not the same kind of
16 conduct.

17 MR. SUBRAMANIAN: Your Honor is correct and I think
18 that this case is worse.

19 THE COURT: Why is it worse? These people made false
20 complaints to government entities to interrupt the business of
21 the plaintiff. It says they clearly did it in order to cause
22 them financial damage and made false complaints to government
23 agencies.

24 I don't mean to clearly make light of the Riches'
25 circumstance, but you are talking about a circumstance where

1 there is direct financial consequences as opposed to people's
2 feelings being hurt. I understand the seriousness of this
3 effect that it would have on them, but I don't know why that
4 this case -- nothing in this case necessarily tells me that the
5 circumstance that you are talking about is better or worse.

6 MR. SUBRAMANIAN: Your Honor, I believe it's less
7 severe. I believe that the interruption of life is more severe
8 than the interruption of business.

9 THE COURT: You say interruption of life. Those are
10 general characterizations. There is not an interruption of
11 life. Nobody shut down their business. They didn't do
12 anything that prevented them from doing something else. As you
13 say, they inflicted emotional distress because of their
14 feelings. You are saying their feelings have value and I
15 understand that.

16 MR. SUBRAMANIAN: Your Honor, that is not an accurate
17 characterization.

18 THE COURT: What is the financial loss? How do you
19 calculate that other than their feelings?

20 MR. SUBRAMANIAN: First of all, the only way that you
21 can survive under an emotional distress claim is by showing
22 emotional distress. In all of these cases, the touchstone of
23 the injury is emotional distress.

24 THE COURT: I understand that. I don't understand how
25 the facts of this case make me say that, oh, if they did it in

1 this case you should have to --

2 MR. SUBRAMANIAN: That's not what I'm saying. I think
3 I identified at least five cases in addition to the many that
4 we cited in our briefing, which are either comparable or less
5 severe, such as the Natalee Holloway case, in which claims were
6 allowed to proceed.

7 THE COURT: I am not sure how this is necessarily
8 comparable --

9 MR. SUBRAMANIAN: Your Honor, if you are not moved on
10 that case, I don't want to linger on it.

11 THE COURT: They have a clear articulable basis on
12 what they say the defendant did and in what way it had caused
13 financial loss to the plaintiff.

14 MR. SUBRAMANIAN: We do as well. When your Honor
15 asked the question --

16 THE COURT: You do as well, but you don't do it in the
17 same manner. Your loss is an emotional loss and that should be
18 valued. I understand that.

19 MR. SUBRAMANIAN: Your Honor, I'm really sorry, but
20 that is not what the complaint alleges.

21 THE COURT: What does the complaint allege with regard
22 to infliction of emotional distress?

23 MR. SUBRAMANIAN: It's not hurt feelings, your Honor.

24 THE COURT: So what it? What was the consequence, the
25 direct causation, the consequence of the infliction of

1 emotional distress in this case?

2 MR. SUBRAMANIAN: Let's go to the complaint and let's
3 go to paragraph 129. The complaint alleges a series of
4 concrete injuries that were sustained by the plaintiffs as a
5 result of the defendants' course of conduct. It's not hurt
6 feelings. We wouldn't be here for just hurt feelings.

7 THE COURT: What is it other than their emotional
8 response?

9 MR. SUBRAMANIAN: It's an emotional distress claim,
10 your Honor.

11 THE COURT: I understand that. That's all I'm saying.
12 I'm not debating this with you. The damages that you say they
13 suffered are emotional damages. I understand that.

14 MR. SUBRAMANIAN: Paragraph 129 refers to
15 posttraumatic stress disorder, which is what our troops in
16 service often experience, debilitating injuries.

17 THE COURT: I will expand it to emotional and
18 psychological damage.

19 MR. SUBRAMANIAN: Absolutely.

20 THE COURT: I understand that.

21 MR. SUBRAMANIAN: Let's move to paragraph 130. It
22 talks about obsessive compulsive disorder.

23 THE COURT: That's the same characterization, right,
24 emotional and psychological damage.

25 MR. SUBRAMANIAN: Absolutely. These can have not only

1 emotional consequences, but also financial consequences.

2 THE COURT: Where does it say that?

3 MR. SUBRAMANIAN: Let's turn to paragraph 133. Just
4 one example.

5 THE COURT: I don't understand that example.

6 MR. SUBRAMANIAN: Which part of it?

7 THE COURT: What is the direct financial loss other
8 than the financial loss that you say resulted as a result -- I
9 am not quite sure what you are saying in this paragraph. They
10 lost what?

11 MR. SUBRAMANIAN: One of the financial consequences of
12 the conduct was that Mary Rich, who was going to take another
13 job that she wanted to take, and she was unable to take it
14 because of the emotional distress caused by the defendants'
15 conduct, and this is alleged. Defendants will have the
16 opportunity in discovery to probe into these issues. But it
17 seems like I am standing up here and I feel like at the
18 complaint stage --

19 THE COURT: That's what I'm trying to understand. You
20 are trying to say there was a particular job offer that she got
21 that she turned down because emotionally she couldn't handle
22 the job.

23 MR. SUBRAMANIAN: That's precisely what this paragraph
24 alleges.

25 THE COURT: Where does it say that?

1 MR. SUBRAMANIAN: Starts in the eighth line and it
2 says: Mary became distraught as a result of the article and
3 subsequent related coverage and was unable to accept the job.

4 That is at least one financial consequence that is a
5 result of the defendants' conduct. It's much more severe than
6 the letters that were sent to restaurants saying that I got
7 food poisoning. It's much more significant than the ugly bride
8 case or in the Howard Stern documentary. This is a campaign
9 that lasted months and months and months.

10 Your Honor, with respect, the question here is whether
11 a reasonable juror could conclude that the conduct here was
12 outrageous. We don't even have full discovery on the case.
13 That's the question. Is there at least grounds at this stage
14 for there to be factual development of the record? Your Honor,
15 we would submit that there is.

16 Your Honor, I am going to now kind of move back to
17 some of the constitutional issues, unless you have other
18 questions on this particular point.

19 THE COURT: No. Go ahead.

20 MR. SUBRAMANIAN: Kind of moving back to the beginning
21 of Fox's argument, they started with this position that -- I
22 guess, as I understand their position, even if we were engaged
23 in this conduct that was targeted at the plaintiffs, we get a
24 get-out-of-jail-free card if the article in question was not of
25 and concerning the plaintiff, and there isn't one case in

America that involves both conduct and speech in the way that defendants' conduct did here that applies that type of of and concerning requirement.

Here is what I mean by that. The defendants point to the *Hustler* case and they say in *Hustler* the court said that the falsity and actual malice requirements for defamation claims also apply to a claim of intentional infliction of emotional distress.

And what's notable is that *Hustler*, like many of the other cases that the defendants rely on, was a speech-only case. It was an attempt by the plaintiff, absent any conduct outside the four corners of the article that was at issue, to try to pin liability on intentional infliction of emotional distress grounds. That's not this case, as we have been discussing.

THE COURT: You try to argue that that's partially this case. You try to argue that you could sustain this case based on the defamatory content of the article.

MR. SUBRAMANIAN: I don't think so.

THE COURT: We can take that out of your case as part of your claims?

MR. SUBRAMANIAN: Absolutely not. When I say our case is outside of the four corners of the article, that's true. Our case is outside --

THE COURT: To the extent that it's outside the four

1 corners of the article, there is a separate argument to be
2 made. To the extent that it's within the four corners of the
3 article, then their argument does apply, doesn't it? To the
4 extent that you are arguing that they inflicted emotional
5 distress by publishing a defamatory article about their son,
6 how is that not the circumstance in which they are arguing that
7 they have protection?

8 MR. SUBRAMANIAN: I think for a number of reasons this
9 presents a different situation, different in kind, one that you
10 can't just kind of slice apart. Because by virtue of the
11 conduct that preceded the article, that is the only way that
12 the article actually ever gets produced. The article is a
13 product of what came before it. It's not some sort of
14 freestanding defamation against the plaintiffs or their son.

15 Remember what I said at the outset. If the article
16 were the only thing that was at issue and Rod Wheeler was never
17 identified as an investigator for the Riches, we might not be
18 here. It's a different case entirely. You can't dissect one
19 piece of this case from another. Just to be clear --

20 THE COURT: I can and the jury may have to if the jury
21 is being asked to determine whether or not this is outrageous
22 conduct that caused the injury and whether or not you are going
23 to argue to that jury that part of the outrageous conduct or
24 even if they don't find that what they did was outrageous, what
25 they said was outrageous. If your argument is what they said

was outrageous, then these issues are --

MR. SUBRAMANIAN: I don't believe that's the case.

THE COURT: You don't believe what's the case?

MR. SUBRAMANIAN: When you say that if our argument is what they said is outrageous, then these issues would arise.

THE COURT: Isn't that what the case law they cite is dealing with, whether or not you can sue someone over the content of the defamatory statement and its effect?

MR. SUBRAMANIAN: If I can move to the cases that show that that's wrong, then it will be made more clear. In cases like *Howell* -- you have *Howell*, which is a New York Court of Appeals case, and in that case the Court says, well, this photograph that you took, publishing that photograph, that might be a privileged matter. And the defendants want us to stop there and say, you can't have any kind of other intentional tort. We are not going to do that because the law has always been that if you abuse the privilege and if you commit a tort a crime in the course of news gathering, that is not protected, and that principle has been in place in the Second Circuit, in the Supreme Court and elsewhere for decades.

You don't get a get-out-of-jail-free card, which is what the defendants want by virtue of the fact that there is speech at issue. Because the speech is just one component of the defendants' course of conduct, and they have not cited to any case that involved this kind of scenario where there is

1 actually conduct outside of the article where the Court says,
2 oh, we are going to give the defendants kind of a freebie here,
3 a mulligan, because there is First Amendment concerns. They
4 just don't come up.

5 On the contrary, in cases that arguably involve
6 conduct plus speech, the courts have sustained IIED claims,
7 intentional infliction claims. One good example of that is
8 *Roach v. Stern*. In that instance, speech is obviously an
9 issue. The source of the emotional distress is the Howard
10 Stern show, where they are talking about these remains and bad
11 things about the plaintiff's sibling or family member. That is
12 the source of the injury.

13 What the Court says is, we are going to sustain the
14 intentional infliction claim here for, among other reasons,
15 because they went forward with the segment against the family's
16 wishes. There was actually some preceding connection between
17 the plaintiff and the defendant. I believe that the brother in
18 the case had actually had given the remains to one of the
19 people who worked with the show, so they had sort of misused
20 those remains.

21 To be perfectly clear, the injury was a result of the
22 speech in that case. The court finds intentional infliction of
23 emotional distress. Same thing in the Natalee Holloway case
24 that I mentioned before. That's a pure speech case. And the
25 Court says, we are not going to apply this of and concerning

1 requirement in this situation.

2 Why? Because the injury claimed here is different
3 than in a normal defamation setting. I would look very
4 closely, your Honor, at the *Holloway* case because it's the kind
5 of most reasoning you get on this type of question in a case
6 that only involves speech. No conduct in that case.

7 I know that defendants raised the case *Snyder v.*
8 *Phelps*. This is the case about picketers at a funeral and
9 whether their conduct was protected by the First Amendment, and
10 it was decided by the Supreme court and the defendants pointed
11 to that case and relied on it pretty heavily. I think that
12 case helps us and shows your Honor why the type of First
13 Amendment arguments that they are making in this case don't
14 hold up.

15 First of all, at issue in that case was an intentional
16 infliction claim that was brought by the father of the person
17 who the speech was directed against because the protesters were
18 protesting the son who had died because of their antigay views,
19 and that is who that speech was directed towards.

20 The Supreme Court did not say, well, because it wasn't
21 of and concerning the plaintiff, you have got no claim. It's
22 out the window. They didn't say that. They addressed the
23 question of whether in that particular case the speech was
24 protected under the First Amendment.

25 What did they say? What did the Supreme Court say in

that case? What they said was, in this particular situation, because the only thing that plaintiff is attacking is the viewpoint of the publication, for that reason we are saying the First Amendment applies.

And the Court is very clear about that in its opinion. It says it's narrow, it makes clear that the picketers were complying with all other rules and regulations. In fact, you couldn't even see the picketers from the funeral and it's not clear that the father actually saw anything other than the tops of the pickets because of how far away they were from the grounds.

And the Court emphasized that in the opinion and said, in this narrow context, this type of speech, this type of claim, where you are equating outrage with viewpoint, that is protected by the First Amendment. That's far afield from what we are talking about in this case, which involves the conduct that we have talked about that is outside of the four corners of the article and which leads to the article's publishing. That is a different case than what we are talking about here.

I'll give you another couple of examples just because they were raised by the defendants. The *Sylvester* case, that's a case where the Court said, well, there is speech about a family member. That alone might not lead to an intentional infliction of emotional distress claim. Then in the very next paragraph, the Court looks at other conduct and other speech

that was compelled and says, this will give rise to a claim.

Let me even give you a further example, and these cases are cited in our brief. The *Flynn* case, which comes out of California, that's a case where the defendants say, well, look, the Court in that case says you have to satisfy the of and concerning requirement. But what they leave out is that the Court, again, said very clearly, this case involves a claim based on speech alone. And if you had a different situation, we might come out differently.

And the Court specifically cites to a prior case, the Langnese case, that did not involve speech alone as a counterfactual situation to what was presented in *Flynn*.

Even in defendants' cases, they sort of recognize this principle that we are not saving you from liability where the speech is a component of a larger course of action that's targeted against the plaintiffs.

And why is that? And the Court in *Holloway* addresses this. The Court says, look, the reason why we have these rules is to prevent a chilling of speech and broad liability for people who are out in the public space publishing. You don't have to worry about that in the intentional infliction of emotional distress case because there are these other elements of the claim that make sure that it can only be asserted by certain types of people.

As your Honor has pointed out, you can't just like do

anything and have liability arise. You have to do something with at least disregard that it is going to have an impact on the plaintiff. That's the standing for the type of of and concerning rule that the defendants would have us superimpose from the First Amendment over into intentional infliction of emotional distress. I don't think there is a basis for doing that.

I am going to talk a little bit, your Honor, about tortious interference, unless you have other questions on intentional infliction.

THE COURT: Go ahead.

MR. SUBRAMANIAN: Very briefly, first, Fox had argued that for tortious interference there is no allegation that Malia Zimmerman knew that the plaintiffs had failed to give Wheeler permission about disclosing the information. So a couple of arguments there. Certainly, the complaint alleges that Malia Zimmerman knew about the terms of the agreement and intentionally procured a breach of the contract that's alleged.

THE COURT: The problem I have with that is that you have two inconsistent theories. She could not have tortiously interfered with a contract that you say was a fraud from the beginning that she was a part of in setting up and falsely claiming to the Riches that they were going to do an investigation. You can't have it both ways. You can't tortiously interfere with the scheme that you had all along

1 that you were never going to perform.

2 MR. SUBRAMANIAN: I disagree, your Honor. There is no
3 greater case of tortious interference than if you intentionally
4 manufacture a contractual relationship with the intent to have
5 it breached.

6 THE COURT: No. There is no such law. There is no
7 such law. You can say it as emphatically as you want, but you
8 cannot tortiously interfere with something that is not a valid
9 contract. There is no case that stands for that proposition.
10 You said that they got together and falsely promised, falsely
11 represented to the Riches that they would do an investigation,
12 there would be a valid investigation. And when they did so,
13 they all fully were engaged in this and none of them ever
14 intended to carry out that promise. You cannot tortiously
15 interfere with a promise that Wheeler never intended to
16 perform.

17 MR. SUBRAMANIAN: Your Honor, we have a contract in
18 writing. There has been no argument --

19 THE COURT: You just said it's not a valid contract.
20 Also, the act of tortiously interfering cannot be a theory that
21 Zimmerman now says to Rich, OK, it's time to pull the plug and
22 do what you claim they already schemed to do. If they had
23 already had an agreement that they were never going to perform
24 this contract, even before the contract was formed, then what
25 contract do you claim that she interfered with and in what way

1 did she interfere with the contract if they had already agreed
2 that they would never perform this contract?

3 MR. SUBRAMANIAN: Your Honor, I guess I don't
4 understand exactly the question.

5 THE COURT: I can simplify it for you. Because I want
6 you to understand the question. The question is, in order to
7 tortiously interfere with the contract, first of all, you have
8 to be a stranger to that contract. That's the first
9 requirement. The second requirement is that there has got to
10 be a valid enforceable contract that the parties are otherwise
11 performing and would have performed had it not been for the
12 interference of the third party who was attached to that
13 contract.

14 That is not the factual scenario that you've alleged.
15 You have alleged a factual scenario where Zimmerman is not a
16 stranger to this contract. Zimmerman is part of the scheme to
17 falsely pretend that there is a contract, which was never
18 formed because Wheeler had already agreed with Zimmerman that
19 they were going to write a false story and that they were going
20 to publish this false story and they were going to inflict
21 emotional distress on the plaintiffs.

22 That's like saying, you and I plan to rob the bank and
23 then when we go into the bank then you have another theory that
24 I made you rob the bank while I was in the bank. No. We
25 already agreed what we were going to do. I can't tortiously

interfere with something you never intended to do that I already agreed with you that you wouldn't do it, no matter what, that you were going to falsely make them think you were going to do it, but you were never going to do it. How does my subsequent action tortiously interfere with something that I already agreed with you that I wasn't going to do?

MR. SUBRAMANIAN: Because you are not a party to the contract.

THE COURT: I am a party to the agreement. There is no contract. You said this was a scheme. You are not arguing that this is a contract. You are arguing this is a scheme. You are arguing that Wheeler had already agreed with Zimmerman that they were going to take these acts. There is no such case that stands for the proposition that if I agree with you that you go ahead and sign the contract with X and we agree that you are never really going to perform that contract, but you are going to pretend like you are going to perform that contract, and then I say to you, OK, it's time for us to pull the plug on this and take the money, that is not a separate act to tortiously interfere.

I am not a stranger. You say I'm a coconspirator. How can be I a stranger? I'm not a stranger. I am the one that told you to go ahead and pretend like you were going to perform the contract. I don't understand that theory.

I don't understand how you can say that there is no

1 such case that stands for the proposition that you and I
2 conspired to enter into a contract that we never intended to
3 perform, but I tortiously interfered with the contract after
4 you falsely said to the other party that you were going to
5 perform the contract. There is no such case. You can't have
6 it both ways. You can't say, we never intended to enter into
7 the contract, we were defrauding them, and then say later on,
8 I'm a stranger to the event, and I stopped you from performing
9 the contract that you were otherwise going to perform, because
10 by definition I was otherwise not going to perform. I didn't
11 perform because you tortiously interfered. I performed because
12 I agreed with you I wasn't going to perform even before we
13 signed on the dotted line. Where do you get this theory that
14 you could have it both ways? I don't understand that.

15 MR. SUBRAMANIAN: I don't think we are trying to have
16 it both ways. Just to be clear, Exhibit 4 to the Terry
17 declaration is the signed and dated contract between the
18 Riches, who were not a party to anything. They sign a contract
19 with Rod Wheeler.

20 THE COURT: And Wheeler had already agreed with
21 Zimmerman that he was never going to perform that contract,
22 right?

23 MR. SUBRAMANIAN: Right. The question on a tortious
24 interference claim is whether you procure the breach of the
25 contract.

1 THE COURT: Exactly. How did Zimmerman procure the
2 breach of the contract if Wheeler already never intended to
3 perform the contract.

4 MR. SUBRAMANIAN: Because Wheeler would never have
5 been hired by the Riches in the first instance.

6 THE COURT: It has to do with whether or not Wheeler
7 was ever going to perform that contract had it not been for the
8 tortious interference, and you've given me a scenario that
9 Wheeler was never going to perform that contract, whether
10 Zimmerman did anything later on to interfere with that
11 contract.

12 MR. SUBRAMANIAN: Your Honor, I want to respond with
13 the elements of the claim just to show you why it's a valid
14 claim. Because the tortious interference requires the
15 contract. We have got that.

16 THE COURT: No, you don't have a valid contract.

17 MR. SUBRAMANIAN: There has been no argument here that
18 the contract is invalid.

19 THE COURT: Yes, there is. It's an invalid contract
20 if Wheeler already decided he wasn't going to perform it.

21 MR. SUBRAMANIAN: It would be the height of injustice.

22 THE COURT: You said that was a fraud. You didn't say
23 that was a contract. You said he committed a fraud.

24 MR. SUBRAMANIAN: It would be the height of injustice
25 to charge the Riches with the scheme perpetrated by the

1 defendants.

2 THE COURT: That is not the issue. The issue is not
 3 charging them with that. The issue is what kind of claim it
 4 constitutes. And it cannot constitute at the same time a
 5 scheme to defraud that was already agreed to prior to the
 6 contract in which Wheeler already agreed that he was not going
 7 to perform the contract and then later on try to define that as
 8 a valid contract that was going to be performed but for
 9 Zimmerman's interference. That's the element. The element has
 10 got to be that there was a contract that Wheeler intended to
 11 perform, but for the interference of Zimmerman. You don't have
 12 that. These facts are not that. These facts are, you had a
 13 contract that Wheeler never intended to perform. So even if
 14 Zimmerman had died the day after the scheme, Wheeler was still
 15 not going to perform that contract. It wasn't Zimmerman coming
 16 in after the contract. And what did Zimmerman do after the
 17 contract that made Wheeler not perform the contract, where he
 18 would have otherwise performed the contract?

19 MR. SUBRAMANIAN: Your Honor, just to take a step
 20 back, there are a few questions there. First of all, you
 21 absolutely can plead in the alternative.

22 THE COURT: Are you pleading in the alternative?

23 MR. SUBRAMANIAN: I don't agree --

24 THE COURT: Don't give me an alternative argument --
 25 wait. One of us talks at once and if I'm talking, you are not.

1 That's the way the rules work. I'll give you full opportunity
2 to be heard.

3 Look. As I always say to the lawyers, you can have
4 alternative theories, legal theories, but you can't have
5 alternative facts. You gave me a set of facts. There is no
6 alternative facts. Either you say the facts are that they got
7 together before they even met the Riches and they all schemed
8 to defraud the Riches by doing these outrageous things and they
9 planned the issue of this phony story and never to perform the
10 contract by really doing the job that the contract requires.
11 They had already agreed to do that, and Wheeler had already
12 made up his mind. Under your scenario, under your facts, isn't
13 it true that before Wheeler met the Riches, Wheeler had already
14 made up his mind, he wasn't going to perform the contract?
15 Right?

16 MR. SUBRAMANIAN: I don't know what's in Rod Wheeler's
17 mind.

18 THE COURT: Yes, you do. Because you allege it in the
19 complaint. You quoted me the paragraph. You say they got
20 together and they intentionally made it appear that Joel and
21 Mary were involved -- that's not the paragraph. Go back to
22 your paragraph 3. Fox News reporter Zimmerman, Fox News
23 contributor and political operative Butowsky thought much could
24 be made of the fact that Seth was a DNC employee. They induced
25 Joel and Mary, his parents, to hire Rod Wheeler -- this was

1 before any contract was formed -- a purported independent
2 investigator to help solve their son's murder. Defendants
3 worked with Wheeler to pursue and develop a fiction that Seth
4 had leaked thousands of DNC e-mails to WikiLeaks and they
5 published, republished, and publicized the sham story which
6 they knew would be covered again and again, and republished
7 here and around the world painting Joel and Mary's son as a
8 criminal and a traitor to the United States. That is not
9 language of a valid contract. That's not language.

10 You can't have it both ways. You can't say that he
11 schemed to falsely induce them into thinking they had a
12 contract and that he was going to live up to the contract and
13 that he agreed with Zimmerman to do that, even before they
14 entered into the contract. But somehow there is a factual
15 scenario that Wheeler would have perform this contracted had it
16 not been for something that Zimmerman subsequently did. What
17 do you say that Zimmerman subsequently did that interfered with
18 the contract that Wheeler intended to perform?

19 MR. SUBRAMANIAN: First of all, this is not an
20 argument that's been raised on this motion to dismiss. There
21 is not a case in America that I'm aware of that says that a
22 third party and a party to a contract can conspire with the
23 intent to breach the contract and that somehow immunizes it
24 from a tortious interference claim. That argument hasn't been
25 raised.

1 THE COURT: That's not true. The scenario that you
2 are giving me is inconsistent with the elements of tortious
3 interference.

4 MR. SUBRAMANIAN: I was going through --

5 THE COURT: Isn't an element of a tortious
6 interference claim that if it hadn't been for the interference,
7 the act of interfering, that the party would have performed the
8 contract? Isn't that an element?

9 MR. SUBRAMANIAN: There is an element of but-for
10 causation and there is no question that Wheeler wouldn't have
11 even been hired on this contract if it wasn't --

12 THE COURT: Hiring is not the question.

13 MR. SUBRAMANIAN: It is the question.

14 THE COURT: No, it is not. Performance is the
15 question.

16 MR. SUBRAMANIAN: That's not true.

17 THE COURT: Tortious interference has nothing to do
18 with hiring. Tortious interference. You have to already have
19 a contract for there to be tortious interference. Was there a
20 valid contract or was there not a valid contract?

21 MR. SUBRAMANIAN: Absolutely. The contract was valid.

22 THE COURT: Was Wheeler ever going to perform that
23 contract?

24 MR. SUBRAMANIAN: I guess we will find out.

25 THE COURT: Your allegation is that he was never going

to perform that contract, that they conspired together to make sure he wasn't going to perform that contract. You can't say that. Don't be disingenuous about your answer. I am not saying it's determinative.

MR. SUBRAMANIAN: I'm not really being afforded, your Honor, with respect, a chance to finish my answer. I would love to do so.

What I was going to say is, the question or the doctrine that you're pointing to, the independent causation requirement, has to do with independently breaching the contract, independent of the defendants on the tortious interference --

THE COURT: You still haven't explained how I could independently interfere with a contract that was never going to be performed by the contracting party.

MR. SUBRAMANIAN: Whether or not the contract was entered into as a result of the defendants' scheme, it's a valid contract.

THE COURT: No.

MR. SUBRAMANIAN: At time one.

THE COURT: No. You keep avoiding the central issue. The central issue is the but-for causation. The central issue has to be that Zimmerman did something to make Wheeler not perform the contract that he otherwise intended to perform. What about tortious interference have I just misstated?

1 MR. SUBRAMANIAN: First of all, you seem to have this
2 idea, your Honor, that there is a principle that if you have
3 engage in a contract, somehow that nullifies a tortious
4 interference --

5 THE COURT: No. I gave you the element. What do you
6 say are the elements? Give me the three or four or however you
7 want to characterize elements of tortious interference. And
8 clearly one of those elements has got to be that I interfered
9 with the contract and the only way I can interfere with the
10 contract is that if I caused you not to perform the contract
11 that you otherwise intended to perform.

12 MR. SUBRAMANIAN: Which the defendants were doing
13 throughout the pendency after the contract was signed. It's
14 not like they stopped doing it.

15 THE COURT: No. If I've already agreed before the
16 contract is signed that I'm not going to perform the contract,
17 you can't say that something else was -- after that was the
18 cause of me not performing the contract if I never intended to
19 perform the contract.

20 MR. SUBRAMANIAN: We are mixing a few different
21 issues. The question of whether you procured the breach of the
22 contract, you don't get a get-out-of-jail-free card just
23 because you were procuring it all the way from time one.

24 THE COURT: You can't procure the breach of a contract
25 before there is a contract.

1 MR. SUBRAMANIAN: That's why we are saying --

2 THE COURT: You say that's what happened in this case.
3 You said they agreed they were never going to perform this
4 contract.

5 MR. SUBRAMANIAN: Zimmerman and Butowsky continued
6 after the contract is in place to perform the breach of that
7 contract.

8 THE COURT: No.

9 MR. SUBRAMANIAN: That's absolutely what they did.
10 Your Honor, since this issue has not been raised --

11 THE COURT: That's fine. I think I understand what
12 you are saying, but what you are saying is legally wrong. It
13 is wrong. Once I decide that I'm not going to perform the
14 contract, I cannot procure the breach of the contract 10 times
15 after that. If I've already made up my mind, I am not going to
16 perform the contract. Nothing that anybody subsequently does
17 procures the breach of the contract because I have already
18 decided I am not going to perform the contract.

19 There is no such theory that if I decide that I am not
20 going to perform the contract, unless you say that there is
21 some evidence that I changed my mind and that I was going to
22 perform the contract, maybe you talked me out of it, if I
23 decided I am not going to perform the contract, there is
24 nothing that you could do to procure its breach if I've already
25 decided to breach it. There is no such theory of tortious

interference of a contract that I already decided, one, that I am not going to perform; two, that the promises I made were false; three, that I made up my mind that I'm really trying to defraud the other party rather than perform the contract.

To simply say that somebody 10 months later said to me, you know what, why don't you breach the contract, if I already decided to breach the contract, that cannot be the cause of my not performing the contract. I don't understand why you don't understand that part of it.

MR. SUBRAMANIAN: I understand what you are saying, your Honor. In this case the facts are a little bit different than what you are talking about. The only reason for the rule that you are talking about, you are talking about but-for causation. If the breaching party, independent of anything that you have done, would have breached the contract anyway, then that becomes an issue in the case.

THE COURT: How does that become an issue in the case? That doesn't become an issue in the case.

MR. SUBRAMANIAN: That's the theory. We are talking about Butowsky and the defendants planting Wheeler in the contract. And when they continued --

THE COURT: You said they never intended to perform the --

MR. SUBRAMANIAN: I'm not aware of one single case that addresses anything close to the facts here and says the

1 defendants are fine because they kind of conspired --

2 THE COURT: They are not fine. They may have a
3 fraudulent inducement. They may have some other claim. Who do
4 you claim is the perpetrator? Who do you claim that this count
5 is against, Zimmerman alone or --

6 MR. SUBRAMANIAN: Zimmerman, Butowsky, and Fox.

7 THE COURT: What did Butowsky do after the contract
8 was formed to tortiously interfere with the contract?

9 MR. SUBRAMANIAN: Absolutely. He is telling Wheeler.

10 THE COURT: When?

11 MR. SUBRAMANIAN: After the contract is in place. He
12 is saying, you are in place, give me what you got. He knows
13 that there is a confidentiality provision in the contract. He
14 is the one that drafted it.

15 THE COURT: You are saying that's what caused Wheeler
16 to do that?

17 MR. SUBRAMANIAN: An element --

18 THE COURT: You said Wheeler already made up his mind
19 that he was going to do that.

20 MR. SUBRAMANIAN: Based on Butowsky's prior conduct.
21 This was a continuing course of conduct.

22 THE COURT: There is no such thing as continuing
23 course of conduct. On this claim there is no such thing as
24 continuing course of conduct. You either induced the breach
25 and when the breach occurs, it's over. It's not a continuing

breach. You can only breach once. You can't breach more than once. He can't be induced to breach if he already intends to breach. You would agree with that? He can't be induced to breach if he's already intends to breach.

MR. SUBRAMANIAN: That's not the standard under the claim.

THE COURT: You don't think that's a true legal statement.

MR. SUBRAMANIAN: Tortious interference requires procurement of the breach, not inducement of the breach. That's not just --

THE COURT: You can't procure the breach if I already intend to breach, can you?

MR. SUBRAMANIAN: I believe you can.

THE COURT: How?

MR. SUBRAMANIAN: Because if the only reason why you intend to breach is because I have already procured your breach --

THE COURT: What is the act that you say procures the breach?

MR. SUBRAMANIAN: It's Butowsky's communications with Wheeler.

THE COURT: When? Tell me when you claim that they induced a breach.

MR. SUBRAMANIAN: The procurement of the breach --

1 THE COURT: As of what date?

2 MR. SUBRAMANIAN: After March 14, 2017, which is the
3 date of the contract.

4 THE COURT: When?

5 MR. SUBRAMANIAN: We believe that from March 2017
6 through to the date of the articles in question that Butowsky
7 and Zimmerman -- it was after the contract is in place -- that
8 Zimmerman and Butowsky were in contact with Wheeler constantly,
9 told him to give them information that he had.

10 THE COURT: But you say that that was already
11 established. You say they intended to do that even before they
12 signed the contract.

13 MR. SUBRAMANIAN: That's where I think we have a
14 difference in terms of what the law requires. This issue
15 wasn't briefed, the one that you're talking about. There is no
16 case that the defendants have cited, not a single case, and it
17 hasn't even been raised as an argument that somehow because of
18 your preceding agreement to engage in a breach of contract that
19 that immunizes you from a tortious interference --

20 THE COURT: It doesn't have anything to do with
21 immunizing.

22 MR. SUBRAMANIAN: That is in fact what you're saying.

23 THE COURT: No, that is not what I'm saying. You tell
24 me what the elements are and I want to know how these facts
25 meet those elements. If the element is, you have to have an

existing contract, would you agree with that? For this claim you have to have an existing contract.

MR. SUBRAMANIAN: Absolutely.

THE COURT: For this claim you have to have an existing contract that both sides intend to perform.

MR. SUBRAMANIAN: If it's an existing contract --

THE COURT: That both sides intend to perform, right?

MR. SUBRAMANIAN: If the rules -- if there is not --

THE COURT: It's not an if. Do you have to have an existing contract that the contracting party intends to perform, yes or no?

MR. SUBRAMANIAN: I am not trying to avoid the question.

THE COURT: You are trying to avoid the question.

MR. SUBRAMANIAN: No, I'm not. Because in the case where you have the Riches, who believe it's a valid contract, sign their names on it where Rod Wheeler has as well, where it's an enforceable contract, the issue -- I think what your Honor is getting to is, was this contract actually enforceable and to what extent does that bear on the question --

THE COURT: No, that's not what I'm getting at. I'm getting at whether or not it was Zimmerman's act, some act by Zimmerman or Butowsky after March, or whatever date you gave me, of 2017, is that what made Wheeler breach the contract that he otherwise would not have breached had it not been for the

inducement?

MR. SUBRAMANIAN: I believe it is and let me give you an example of why. At least this. Let's say that Wheeler -- they had these prior discussions, whenever they might be, and they get into this contract. After it's in place, Malia Zimmerman and Butowsky realize how outrageous and crazy this whole scheme is and they say, Rod Wheeler, we don't want you to do this. Let's say one of them does it and Wheeler says, I changed my mind, too. I don't think it's a good idea. But then later in time they go forward and they induce him to breach later because --

THE COURT: I totally agree because at the time of the inducement, Wheeler intended to perform the contract and if it hadn't been for Zimmerman inducing Wheeler to breach the contract, he would have performed the contract at that time. That is not the scenario that you have laid out in this complaint. You give me a scenario where Wheeler even long before the contract was even entered into signed a contract that he never intended to perform. He didn't not perform this because Zimmerman said, in April of 2017, don't perform this contract that you were getting ready to perform. They knew before the contract was ever signed that he was never going to perform this contract.

Zimmerman is not a stranger to this contract.
Zimmerman is the one that helped set up this contract and

1 agreed with Wheeler that Wheeler was never going to perform and
2 that was before the contract was signed. So nothing Zimmerman
3 did after the contract was signed on the facts that you have
4 given me that made Wheeler change his mind and decide, I am not
5 going to perform the contract that I otherwise was going to
6 perform if it hadn't been for Zimmerman talking me out of it.

7 MR. SUBRAMANIAN: Your Honor, you are raising a lot of
8 factual questions. Not to cut this short, but I disagree on
9 the legal kind of framework that you are discussing. This is
10 not an issue that has been briefed in this case. What I would
11 suggest is, if your Honor is thinking hard about this, why
12 don't we maybe submit a posthearing brief.

13 THE COURT: That's fine. I am trying to figure out
14 the limit and extent of your argument. Your argument on this
15 point is not grounded in law. You cannot argue the scenario is
16 that you must have a valid contract that the party was prepared
17 to perform, a stranger to that contract came in and induced
18 that party not to perform the contract that they otherwise had
19 an obligation to and intended to perform. That is not the
20 scenario that you have laid out in this complaint.

21 The scenario you laid out in this complaint is that it
22 was a sham contract. You called it a sham contract. This was
23 a fraud that Wheeler never intended to do what the Riches
24 wanted him to do, and even before he signed on the dotted line
25 he made up his mind and never changed that intent to basically

defraud them and to basically, as you say, intentionally inflict emotional distress on them. That was his intent. His intent wasn't ever to perform this contract.

If the person says to me, well, I know I signed the contract, but I am never going to perform that, there is nothing that I can do after that that's going to be the cause of them not performing the contract. It's impossible. It's legally impossible unless I change my mind and at the time I say I am going to perform the contract, and you can demonstrate to a jury why, but for my interference into the relationship between the two, after they form the contract that the contract would have otherwise been performed. In this case the contract would not have otherwise been performed because Wheeler had already made up his mind he wouldn't sign the contract that he wasn't going to perform, you say.

MR. SUBRAMANIAN: Based on the interference by the parties.

THE COURT: It wasn't interference. You can only interfere by being a stranger. You say this was a scheme, conspiracy that was engaged in by these parties to defraud the Riches long before they even met the Riches. It can't be that they are somehow stranger to this contract.

MR. SUBRAMANIAN: Your Honor, I hear you. If it pleases the Court, what we would do is submit a brief, no longer than five pages, by next week on this issue.

1 THE COURT: As I say, the most effective advocacy is
2 to be consistently reasonable. I want you to look at the law
3 and I want you to tell me that there is some ground on which
4 you can say that a contract that already intended not to
5 perform, that someone else can be liable for tortious
6 interference if I already intended not to perform the contract.

7 MR. SUBRAMANIAN: Absolutely. We will have that
8 briefing submitted to your Honor. Thank you. We want to be
9 responsive to the Court's concerns.

10 The last thing I'll say, and if it pleases the Court
11 I'll turn it over to Ms. Baron to talk about the personal
12 jurisdiction issue, but the last thing is just that a lot of
13 the issues, even with respect to this that we are talking
14 about, I think would be aided by development of the facts.
15 When your Honor is considering these issues as fact intensive
16 as they are, given the stage of the case that we are at, the
17 easiest way to find of resolve these issues would be to say,
18 look, let's get some development of the facts and then revisit
19 these fact-intensive issues.

20 THE COURT: Everyone makes that argument.

21 MR. SUBRAMANIAN: I know, your Honor. But in this
22 particular setting where we are talking about things like
23 intent, knowledge, and outrageousness, I think it really makes
24 a huge impact. That's raised in every case. I have said it a
25 hundred times. I think it really does make a big impact in

1 this case.

2 THE COURT: That's dependent on whether you made the
3 threshold showing in the complaint.

4 MR. SUBRAMANIAN: I think that's right. That kind of
5 bears it out because in what we are talking about now is
6 looking at the pleadings, giving us every inference favorable
7 in our direction, which I don't think is how the defendants
8 have been viewing the case.

9 THE COURT: Let's take a short break and we will deal
10 with jurisdiction.

11 (Recess)

12 THE COURT: Yes, ma'am. I have some tough questions
13 for you, too.

14 MS. BARRON: I have seen what you have with my
15 colleague, so I'm very excited.

16 My name is Elisha Barron. I am going to address
17 jurisdiction.

18 First, Mr. Butowsky states the wrong standard for what
19 plaintiffs need to meet prior to jurisdictional discovery.
20 Perhaps, more importantly, he ignores the allegations that
21 you've identified several times today that Fox was the
22 epicenter of this case and because he's end game with the
23 publication of the article on Fox News in New York. I will
24 just quickly address the standard and then I'll go into the
25 facts.

1 This is from *In Re Magnetic Antitrust Litigation*. It
2 is a Second Circuit case from 2003. It's cited in
3 Mr. Butowsky's brief. It says: Prior to discovery, a motion
4 to dismiss may be defeated based on legally sufficient
5 allegations of jurisdiction. You resolve all the ambiguities
6 in favor of the plaintiffs. It was only after plaintiff has
7 engaged in jurisdictional discovery that we must include an
8 averment of facts that, if credited, would suffice to establish
9 jurisdiction.

10 If we do not meet that standard, you can deny this
11 motion flat out. But at the very least we are entitled to
12 jurisdictional discovery, which we have had none of.

13 On the facts, New York was the center of gravity of
14 this case. The tie between all of the defendants is Fox News,
15 the end goal with the publication of the article by Fox News in
16 New York. Paragraph 8 of our complaint: Fox News acted with
17 the assistance of Fox's employees and agents Zimmerman and
18 Butowsky in New York. Most, if not all of Fox News' decisions
19 were also made in New York and communicated from the state.

20 THE COURT: Isn't the case law that in order to
21 establish jurisdiction over Butowsky, you can't rely on the
22 contacts of other defendants. You have to rely on the contacts
23 of Butowsky. What is the New York-related conduct by Butowsky
24 that makes it sufficient for us to say that Butowsky is here?
25 You can't simply say because the codefendant is in New York.

You have to tell me what his engagement was and his conduct was with regard to this activity that is sufficient to make it reasonable to haul him from Texas to New York if there is not an allegation that he was in New York in relationship to this activity.

MS. BARRON: Completely agree, your Honor. Under 302(a)(1), which is the section we are invoking, first of all, he doesn't have to be in New York. We know that. He can be injecting himself into New York from outside New York, which is what we allege. Mr. Butowsky's counsel says the only thing is this one e-mail. That's not right at all.

THE COURT: Give me the list of things that you say are the basis for jurisdiction over him. You say the e-mail.

MS. BARRON: Let me start chronologically. This is what we know now with no jurisdictional discovery at all.

Paragraph 34. In Butowsky's own words, he says to Wheeler -- this is how he first meets Wheeler. It's through Fox. He says: Although I'm not a paid Fox contributor, I do appear frequently on the news channel as well as the business channel. Behind the scenes I do a lot of work unpaid helping to uncover certain stories. I'm looking for some assistance.

Already he has explained what his relationship to Fox is. This is what he does. He's outside of New York working with Fox News inside of New York to uncover stories.

THE COURT: That would be a basis to argue that there

1 is some general jurisdiction, but that doesn't say that he has
2 any connection to the acts and occurrences with regard to this
3 lawsuit in New York.

4 MS. BARRON: You are looking at the totality of the
5 circumstances and the fact that his standard relationship with
6 Fox News is to be outside of New York transacting with Fox
7 News, and I will walk through the allegations showing that he
8 did that here. I am trying --

9 THE COURT: You are not arguing that we have general
10 jurisdiction over him.

11 MS. BARRON: No. This goes to specific jurisdiction.

12 We then have the e-mail where he says: I'm actually
13 the one who has been putting this together, but, as you know, I
14 keep my name out of things because I have no credibility.

15 THE COURT: What paragraph are you reading?

16 MS. BARRON: 82. He sends this to Fox News producers
17 and on-air talent in New York. That is the allegation. Do we
18 know for certain that they were all sitting together in New
19 York at the time?

20 THE COURT: It doesn't matter.

21 MS. BARRON: Exactly.

22 THE COURT: Let me ask you the first question. Do you
23 think that that e-mail alone would be sufficient to assert
24 jurisdiction over him in this lawsuit?

25 MS. BARRON: I think it would certainly be sufficient

1 to get discovery. There are cases that say that a single
2 communication from outside of the state where it is evidence
3 that somebody is -- let me get the language exactly right --
4 seeking out and initiating contact with New York and
5 establishing a continuing relationship, that that alone can
6 establish jurisdiction.

7 So yes is the answer to your question. That is not
8 all we allege, but that would be enough.

9 THE COURT: Because I know cases that say a single
10 e-mail is not enough. I know of no cases that say that a
11 single e-mail is enough.

12 MS. BARRON: Maybe I could point you to the case that
13 Mr. Butowsky cites in his reply brief. It is *Carlson v.*
14 *Cuevas*, 933 F.Supp. 76, and that case draws an important
15 distinction. This is about telephone calls, but
16 communications. It says: Telephone calls are significant only
17 if they are used by the defendant to actively participate in
18 business transactions in New York.

19 Paragraph 82 is Mr. Butowsky actively participating in
20 the transaction at issue, which is the publication of this
21 article.

22 THE COURT: The language you just quoted from the
23 case, is that a case where the Court said that one phone call
24 to New York was sufficient to assert jurisdiction?

25 MS. BARRON: It cites to the case where a call to New

1 York is sufficient for jurisdiction, which is the *Park-Bernet*
2 *Galleries, Inc. v. Franklyn*. I have that case here. I can
3 hand it up. In that case it says -- the Court quotes it as
4 saying: Using a phone to link a representative actively
5 participating in a New York auction with the out-of-state
6 defendant, the defendant subjects himself to New York
7 jurisdiction.

8 THE COURT: That's a little different, though, because
9 it's the auction itself that's taking place over the phone. If
10 there is a lawsuit about the auction, I can understand that.

11 MS. BARRON: In that case an auction is happening in
12 New York and this defendant --

13 THE COURT: Is participating in that auction from
14 someplace else by phone. They are participating in that
15 auction by phone, and I'm assuming that this lawsuit has to do
16 with that activity over the phone.

17 MS. BARRON: Yes. May I analogize it to this case?

18 THE COURT: Yes.

19 MS. BARRON: Here, Mr. Butowsky is exercising
20 significant influence over when and how and what is published
21 in this article, and he is doing it from outside of New York,
22 we think. He may have come to New York. But rather than being
23 in that Fox News office looking over someone's shoulder and
24 saying, here is how we have to play this, he is sending an
25 e-mail. He also exchanges drafts with Ms. Zimmerman and

1 presumably --

2 THE COURT: Zimmerman is in California.

3 MS. BARRON: Zimmerman is in California, but the
4 article that is being vetted for publication in New York.

5 THE COURT: Again, I am trying to concentrate on
6 Butowsky's conduct. Again, you can't sort of, with specific
7 jurisdiction, say well, he's communicating with Zimmerman and
8 Zimmerman is communicating with New York, so, therefore,
9 Zimmerman's communication with New York is a basis to assert
10 jurisdiction over Butowsky.

11 MS. BARRON: He's inserting himself and exercising
12 influence over a publication that is going to happen in New
13 York.

14 THE COURT: When you say it's going to happen in New
15 York --

16 MS. BARRON: Fox News is in New York and the
17 publication is going to happen in New York at Fox News and that
18 was intentional. They didn't want it published in Fox D.C.
19 Butowsky wanted it published in Fox News in New York so that it
20 could get the largest amount of publicity. Here he's
21 specifically taking advantage of this platform that Fox News
22 New York offers and that was a conscious decision. We don't
23 know all of the steps he took to ensure that that happened. We
24 have one communication and the reason we have even that
25 communication is because of Mr. Wheeler's lawsuit. At the very

1 least we need discovery into what more there was.

2 THE COURT: What do you think you are going to fish
3 for in discovery?

4 MS. BARRON: Evidence that he visited New York, other
5 e-mails with Fox producers. We have one. There is no reason
6 to believe that that was the only e-mail.

7 THE COURT: I don't know. There is no reason to
8 believe that there were a hundred e-mails.

9 MS. BARRON: That is that the facts necessary to
10 establish jurisdiction lie within Butowsky and Fox's exclusive
11 knowledge and that is where discovery is authorized.

12 THE COURT: His individual conduct so far, conduct
13 itself, is the e-mail.

14 MS. BARRON: Directly into New York, that is the only
15 conduct that we know of.

16 THE COURT: And you say that what else should be
17 considered other than his conduct and his personal contact with
18 New York? I'll put it that way.

19 MS. BARRON: The fact that he invoked his relationship
20 with Fox News New York to get Wheeler into this scheme and
21 says, this is what I do. I'm a guy with Fox News. I uncover
22 stories. So that's paragraph 34. He is taking advantage of
23 Fox News in New York to carry out this scheme and that is what
24 302(a)(1) requires. That's the transacting business. The
25 fact --

1 THE COURT: What part of this scheme, other than the
2 ultimate publication, if that's the case? I don't know if
3 that's the case. We are assuming that Zimmerman sent her
4 article to New York and New York published the article. I am
5 not sure how that happened. I forget now. Are we talking
6 about -- the article was published in what form?

7 MS. BARRON: It was on the Internet, among other
8 things.

9 THE COURT: It was on the Internet.

10 MS. BARRON: If I could just point you to --

11 THE COURT: That's not a New York publication.

12 MS. BARRON: It was a New York publication.

13 THE COURT: The Internet.

14 MS. BARRON: I don't know all the different media on
15 which it went out, but it went out from New York, Fox News in
16 New York, Zimmerman repeatedly said. When Mr. Wheeler is going
17 to talk to D.C., Zimmerman says, New York won't be happy. This
18 was a New York -- when Mr. Butowsky e-mails people, he e-mails
19 people in New York. So New York was the epicenter and you are
20 right that the ultimate end game was the publication of this
21 article and that happened in New York.

22 THE COURT: Except Butowsky didn't publish the
23 article.

24 MS. BARRON: No. But he exercised significant
25 influence over the publication and dissemination.

1 THE COURT: It wasn't his determination as to where
2 the article was going to be published. Fox News could have
3 published it in China if they wanted to. He didn't have any
4 control over that. He didn't direct this to be published in
5 New York.

6 MS. BARRON: If Fox News was based in China, then I
7 agree with you that New York would not be the proper place for
8 this lawsuit.

9 THE COURT: That's not necessarily so. There are a
10 lot of news agencies that are headquartered in certain places
11 and they may or may not issue their stories in certain
12 locations for certain audiences. That doesn't determine what
13 jurisdiction you have over people who might have helped put
14 together the article.

15 MS. BARRON: That is not this case. In this case they
16 did it in New York. Fox News was in New York. The defendants
17 referred to it as New York. Mr. Butowsky tells Wheeler, I'm
18 doing this, I'm doing it with Fox News. He is inserting
19 himself into New York. The relevant transaction is the
20 publication of the article and the later further publication on
21 TV, news shows, by New York-based Fox people.

22 THE COURT: You don't claim that there is any other
23 activity at this point by Butowsky in New York or in
24 communication with people in New York?

25 MS. BARRON: We do allege that there are additional

1 communications.

2 THE COURT: Like what?

3 MS. BARRON: In paragraph 8.

4 THE COURT: 8?

5 MS. BARRON: 8, yes. Fox News asked acted with the
6 assistance of Fox's employees and agents. Defendant Zimmerman
7 and Butowsky in New York, most if not all --

8 THE COURT: I'm sorry. I am not sure what that means
9 because it can't mean defendants Zimmerman and Butowsky were in
10 New York. That's not what you mean to say.

11 MS. BARRON: Fox News was acting in New York.

12 THE COURT: You are saying Fox News also acted with
13 the assistance -- Fox News also acted in New York. That's the
14 way it's supposed to read.

15 MS. BARRON: Fox News was acting in New York.

16 THE COURT: You don't mean that sentence to stand for
17 the proposition that defendants Zimmerman and Butowsky were
18 active in New York.

19 MS. BARRON: If I could echo Mr. Harrison, we don't
20 know.

21 THE COURT: That's not what you're alleging here or is
22 that what you're alleging? Are you alleging?

23 MS. BARRON: We are not alleging.

24 THE COURT: That Butowsky acted in New York.

25 MS. BARRON: We don't know where Butowsky acted.

1 THE COURT: So that's not this representation. You
2 don't mean to represent by this statement that he acted in New
3 York. That was not your intent when you wrote that sentence.

4 MS. BARRON: Yes. We believe he was acting in New
5 York.

6 THE COURT: That's what I'm asking. What are you
7 referencing then? What did he do in New York? That's what I
8 want to ask. You say he acted in New York. What were you
9 referring to?

10 MS. BARRON: Whether or not he was physically present
11 in New York, which we don't know, he was exercising influence
12 over an article that was being published in New York and was
13 going to be disseminated in New York.

14 THE COURT: By this statement you are not trying to
15 say that he committed an act while he was in New York.

16 MS. BARRON: Other than the e-mail, we don't have any
17 concrete knowledge, and that is why we need discovery. We
18 couldn't possibly have that knowledge.

19 THE COURT: You could. Anything is possible.

20 MS. BARRON: Yes. That was a misstatement.

21 THE COURT: You don't have it.

22 MS. BARRON: He could have admitted that he came to
23 New York. But instead --

24 THE COURT: He has admitted he's been to New York
25 several times. He just said he wasn't in New York in regards

1 to this.

2 MS. BARRON: We shouldn't be required to credit his
3 counsel's assertions that he hasn't been in New York with this,
4 particularly since he also made the assertion that we don't
5 know if he's ever been to New York. We do know that he's been
6 to New York, as you just said. We can't credit what
7 Mr. Butowsky's counsel says he doesn't know. We are entitled
8 to discovery.

9 THE COURT: That is your discovery argument. Are you
10 abandoning your argument that this is really enough?

11 MS. BARRON: Absolutely not. His purposeful availment
12 of New York through this single e-mail, where he is very firmly
13 directing people at Fox News about how and when this article is
14 to be published and how it should be disseminated on TV is not
15 enough. That is not an e-mail saying, hey --

16 THE COURT: Which paragraph?

17 MS. BARRON: It's paragraph 82. It's not an e-mail
18 saying I'm very interested in this article. It's not a
19 casual -- I am the one who has been putting this together and
20 one of the big conclusions we -- that's Mr. Butowsky and Fox
21 News -- need to draw from this is that the Russians did not
22 hack our computer systems.

23 And what follows from that, this is paragraph 104: On
24 the day the Fox article was published, Steve Doocy, cohost of
25 Fox & Friends and one of the individuals in New York who was

1 e-mailed, says: For a long time on the Internet and elsewhere,
2 he has been rumored to have been the one who gave WikiLeaks the
3 DNC e-mails. So if that is true, and we don't know yet, it
4 looks likes Russia didn't give it to WikiLeaks.

5 THE COURT: Where are you reading from?

6 MS. BARRON: Paragraph 104 of the complaint.

7 THE COURT: But I have bullet points. What bullet
8 points? I don't see that language.

9 MS. BARRON: It's the third bullet point.

10 THE COURT: Read that language again.

11 MS. BARRON: On the day that the Zimmerman Fox article
12 was published, Steve Doocy, cohost of Fox & Friends -- and this
13 is me, not the quote. He is one of the people who was e-mailed
14 in New York -- says: For a long time, on the Internet and
15 elsewhere, he, that's Seth Rich, has been rumored to have been
16 the one who gave WikiLeaks the DNC e-mails.

17 So if that is true, and we don't know yet, it looks
18 like Russia didn't give it to WikiLeaks. He is implementing
19 the instruction on Fox & Friends in New York that Mr. Butowsky
20 e-mailed the day before saying here is what you need to do with
21 this article that I've been putting together.

22 I can't think of a more clear case of inserting --

23 THE COURT: I don't see where he says what to do with
24 it.

25 MS. BARRON: He says, one of the big conclusions we

1 need to draw from this is that the Russians did not hack our
2 computer systems. And then Doocy says, it looks like Russia
3 didn't give it to WikiLeaks.

4 THE COURT: I understand.

5 MS. BARRON: There is law that you don't need to be in
6 New York and that a single communication can satisfy 302(a)(1)
7 under certain circumstances. This is about the clearest
8 circumstance of someone inserting themselves into business in a
9 different state. I can't think of a more clearer case.

10 THE COURT: I would hesitate to characterize it that
11 way. I have seen a lot more clearer cases.

12 MS. BARRON: Of a single communication.

13 THE COURT: Yes. This single communication is not
14 like, here, I'm in Texas, let me give you directions. Drive to
15 New York or New Jersey and put this on a New York station. He
16 doesn't even mention New York. No. This isn't the clearest.
17 This is one e-mail saying that we ought to publish that and say
18 he had nothing to do with WikiLeaks. That statement could have
19 been made from anywhere to anywhere. That's not a real
20 specific direction that anticipates that New York is critical
21 to this delivery.

22 MS. BARRON: I will walk back my statement that it was
23 the clearest case, but you don't need to say, hey, you guys in
24 New York, and he is inserting himself into it.

25 THE COURT: What makes me hesitate on that alone is

that that one line out of one e-mail to be the sole basis of asserting jurisdiction over someone who is down south in Texas, who was not in New York at the time he sent the e-mail. There are not a series of e-mails, that is not a direction that would give some indication that he's putting himself, exposing himself to legal liability in New York and should anticipate it's going to be reasonable that he is going to be hauled into court in New York based simply on one e-mail that he sent to somebody in New York. If that is the case, it would be the opposite of most of the cases that I'm aware of because if someone that I sent an e-mail to happens to be in California, then it's reasonable for them to haul me into court in California based simply on the fact that I communicated by e-mail with that person.

MS. BARRON: If someone is secretly behind the publication of an article, knowing and intending that that article be published in New York, I do think it is entirely reasonable that they should expect to be hauled into court there.

THE COURT: I don't know. It is reasonable to think that it may be published in New York, but that's not what's critical to the scheme?

MS. BARRON: Your Honor, I disagree.

THE COURT: It's not critical to your claim. The activities, most of the activities that you complain about that

1 you say are outrageous conduct for the infliction of emotional
2 distress or you say is -- I'm not even sure -- I'm not quite
3 sure on what you say is the basis for suing Mr. Butowsky in New
4 York on tortious interference. What activity in New York is
5 related to tortious interference?

6 MS. BARRON: The purpose of that contract was
7 ultimately the publication of this article. It was not an
8 accident that the publication would be in New York. It was not
9 a coincidence.

10 THE COURT: I know. But that's not the claim. That's
11 not the tortious interference claim. The tortious interference
12 claim is they induced a breach of the contract. The contract,
13 as far as I know, wasn't signed in New York. The contract, as
14 far as I know, wasn't to be executed in New York. The
15 contract, as far as I know, wasn't reached in New York. The
16 contract, as far as I know, wasn't induced to be breached in
17 New York.

18 Where is the specific jurisdiction with regard to a
19 tortious interference with contract for suing Butowsky in New
20 York for tortious interference?

21 MS. BARRON: The elements that you just recited are
22 what courts look at when they are looking at a breach of
23 contract case to decide whether there is specific jurisdiction.

24 Tortious interference is a tort and the question is
25 whether the transaction of business is connected to that claim.

1 We allege that the reason that the contract was tortiously
2 interfered with was in furtherance of the publication in New
3 York of this article.

4 THE COURT: But that's not related to the claim. The
5 claim is that there was a contract entered into and that the
6 contract was breached. That would be like saying if Wheeler
7 decided that while he was in Milwaukee that he got a call and--
8 while he was in Milwaukee he decided he wasn't going to perform
9 the contract that somehow the contract is now -- there is some
10 jurisdiction in Milwaukee for him to assert jurisdiction over
11 somebody else. The claim itself has to be related to New York,
12 not some aspect of the activity. The claim has to have a
13 relationship to New York. The breach of the contract or the
14 tortious interference, no part of the claim occurred in New
15 York, did it?

16 MS. BARRON: This hasn't been briefed or anything,
17 but, yes. Mr. Wheeler provided information for an article to
18 be published in New York. The main breach that we allege was
19 the inclusion of his statements in the article that was
20 published by Fox News in New York, and Mr. Butowsky
21 intentionally procured that breach for the purpose of his
22 business transaction in New York, which was to exercise
23 influence and ultimately disseminate this article from the New
24 York platform.

25 THE COURT: That wasn't my understanding of what was

the claim or the main part of the claim. My understanding, as it was argued, is that the breach that was procured was in convincing Wheeler to breach the confidentiality of the agreement by giving information to Zimmerman.

MS. BARRON: Correct.

THE COURT: That doesn't have anything to do with New York. She was in California. My understanding, Wheeler wasn't in New York when he breached. She wasn't in New York when she procured the breach. And if it was the divulging of the breach of the confidential of the agreement, that didn't occur in New York, wasn't related to New York, was done even before the article was published. The contract was already breached when the article was published by that scenario.

MS. BARRON: It was breached days before by Mr. Wheeler disclosing this information --

THE COURT: What does that have to do with New York?

MS. BARRON: Mr. Wheeler is a Fox News contributor. He has a contract with Fox News. He then, having failed to disclose that to the Riches, breaches the confidentiality agreement that they have to give his employer, for purposes of this, the information that will go into the article that his New York employer is going to publish in New York. And Mr. Butowsky helped orchestrate that scheme with the end goal of it being published by Fox News in New York. I don't agree that there is no connection between the tortious interference

1 and New York.

2 THE COURT: I am not sure what the publication has to
3 do with the tortious interference.

4 MS. BARRON: The reason for the tortious interference
5 was the publication.

6 THE COURT: If I robbed a bank, the reason may be
7 because I want money, but that's not the claim. The contract
8 didn't provide for a publication in New York. The contract had
9 nothing to do with the publication in New York. The contract
10 didn't contemplate New York. By the complaint, the way the
11 complaint is written, it didn't contemplate any particular
12 jurisdiction. It contemplated that Wheeler was going to
13 respect the confidentiality of the Riches, and he breached
14 that, and clearly he breached that somewhere other than New
15 York, didn't he?

16 MS. BARRON: We don't allege that Mr. Wheeler was in
17 New York.

18 THE COURT: You don't allege that Zimmerman was in New
19 York when she got that information?

20 MS. BARRON: But the Fox News publishers that we do
21 allege were part of this conspiracy and were the ultimate
22 publishers of the article and the ultimate beneficiaries of
23 Mr. Wheeler's providing this information in New York were in
24 New York. And Mr. Butowsky, who is the only one who disputes
25 jurisdiction, was orchestrating that. If Mr. Butowsky had been

an employee of Fox News, there would be no dispute that there was jurisdiction.

THE COURT: I am still not clear what Mr. Butowsky did to tortiously interfere. I am not sure why that claim is against him.

MS. BARRON: I can give you one example from the complaint.

THE COURT: I know that wasn't what you intended to argue. I understand at least the theory and the argument in the complaint that Zimmerman sought the information from Wheeler in breach of Wheeler's obligation to keep it confidential, but I don't see any allegation that Butowsky had anything to do with that.

MS. BARRON: It's paragraph 74 of the complaint.

THE COURT: Yes. I think we did this before.

MS. BARRON: On May 14, 2017, that's two days before the publication, Butowsky informed Wheeler that President Donald Trump had read a draft of the Zimmerman public article and wanted it published immediately. Then the following day, not only does Zimmerman call Wheeler and tell him that the bosses at Fox, that's Fox News in New York, wanted to go with the article --

THE COURT: Where are you reading from?

MS. BARRON: Still paragraph 74.

THE COURT: But wasn't the contract already breached

by then? He had already given the information to Zimmerman.

MS. BARRON: The breach was giving her the information for the article.

THE COURT: Right. And that happened when?

MS. BARRON: On May 15, around May 14 or 15, at the exact time that this is happening, where Butowsky --

THE COURT: It had to happen before this happened because it's making reference to that. He is saying that they are already had the information. Zimmerman has already written the article. Wheeler has already breached the agreement before this conversation.

MS. BARRON: The breach that caused the harm was Wheeler going live.

THE COURT: I thought it was Wheeler disclosing the information to Zimmerman and for Zimmerman to put in the article.

MS. BARRON: Correct. But the harm results from putting it in the article and Butowsky is the one who says close this deal, whatever you have got to do. It's not correct that only Zimmerman was procuring that breach and benefiting from that breach. And the breach --

THE COURT: I don't understand. If you argue that Wheeler had already reached the contract when he gave the information to Zimmerman, then there can't be a second breach of the contract after the contract is already breached by

publishing the article.

MS. BARRON: I don't think that you can separate him giving the information for her to publish in the article the next day at the behest of Butowsky and Zimmerman from -- I don't think you can separate that into two separate events. That is the breach.

THE COURT: Are you saying that Butowsky did something personally to procure the breach or are you saying that he is somehow vicariously liable for Zimmerman?

MS. BARRON: This is in paragraph 74. It says: Butowsky left Wheeler a voice mail telling him to close this deal, whatever you've got to do. So Butowsky, for whatever reason, thought that he needed to add his influence to get Wheeler to give this information to Fox News in New York.

THE COURT: I guess the other part I should have asked earlier is that doesn't the procuring the breach have to be some sort of wrongful means, some sort of wrongful conduct? I'm not sure that you can argue that if I say close this deal, whatever you got to do, constitutes wrongful conduct for tortious interference. I can't just simply say, well, why don't you breach your contract and that alone doesn't constitute wrongful means for breach of contract.

MS. BARRON: Tricking someone into signing a contract --

THE COURT: That's different. Tricking someone might.

1 That could be wrongful means. But you don't claim Butowsky or
2 Zimmerman tricked Wheeler into breaching the contract. You
3 just say that they asked him to breach the contract. Why would
4 that constitute wrongful means for a tortious interference?

5 MS. BARRON: Mr. Butowsky orchestrated the entire
6 scheme of having the contract entered into in the first place
7 and ultimately procuring its breach, knowing, because he
8 drafted the contract, that there was a confidentiality
9 agreement and that the Riches had very explicitly taken out of
10 that agreement Mr. Wheeler's right to represent them in public
11 and, instead, had put in something saying that you cannot speak
12 to the press under any circumstances without our approval. It
13 is wrongful conduct for him then to call Wheeler and say, close
14 this deal, breaching everything about that agreement by sending
15 this information to Fox News in New York to be published in New
16 York.

17 Just going to your distinction between tortious
18 interference and IIED, it's all part of the same conduct, all
19 of which was ultimately directed to New York.

20 If you are not convinced that that single e-mail is
21 enough, at the very least, jurisdictional discovery, we think
22 it's enough. Unless you have other questions, I will leave it
23 at that.

24 THE COURT: Sure. That's good.

25 Did you want to quickly respond?

1 MR. SUBRAMANIAN: Your Honor, before the defendants
2 reply, just on the last point that you raised, just one case
3 that might clear it up.

4 THE COURT: Sure.

5 MR. SUBRAMANIAN: Your Honor brings up out of the
6 intent requirement for tortious interference, and Fox in its
7 reply says that for an existing contract the defendant has to
8 have a sole intent to harm the plaintiff, and they say that in
9 their brief and they point to a 1997 case called *Elliott*
10 *Associates* that was raised for the first time in reply.

11 That case is analyzed in a subsequent decision, a 2004
12 decision from the Eastern District of New York, which is called
13 *Flash Electronics v. Universal Music*. If I can hand up that
14 decision.

15 THE COURT: Sure.

16 MR. SUBRAMANIAN: I think it might get us the answer
17 to what your Honor just asked.

18 Your Honor, what the Court in *Flash Electronics* says,
19 on page 18 of the printout, and I've highlighted it. It's text
20 in the page and also footnote 13. It says that the 1997 *Elliot*
21 *Associates* case was based on older decisions that had been
22 superseded by the New York Court of Appeals decision in the
23 *Guard-life* case.

24 And if you look in the text, it gets to this wrongful
25 means question that you raised, your Honor, and it makes clear

that where there is an actual existing contract, there is no wrongful means requirement. And what the Court says is: Where there is an existing enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior.

Then it goes on to say that there are cases involving prospective relations, tortious interference with prospective relations, and for those situations there is a wrongful means requirement.

With that, I'll leave it to our briefing because we do address both standards and how they play out in this case.

MR. TERRY: Your Honor, I'll be brief, in light of the hour.

I want to start first with the tortious interference questions since we just talked about that. I think the questions you were asking Mr. Subramanian get right to the heart of the problem with the claim.

If the scheme that they allege was that Wheeler was always going to provide information, no matter what the contract says, then Ms. Zimmerman, Fox, and Mr. Butowsky can't possibly be liable for inducing that breach.

One of the cases we cite, which is the *Huggins* case, *Huggins v. Povich*, makes the very point you were making. It

1 concludes: There was no inducement because "she needed no
2 inducement from defendant to breach the confidentiality
3 agreements. Her actions were willful and intentional and done
4 with complete and knowing disregard of the confidentiality
5 agreement. There was an ellipses. That is the essence of the
6 quote from the Huggins case.

7 And Mr. Butowsky actually makes this argument at pages
8 9 and 10 of his brief that there cannot be tortious
9 interference where a party has a propensity to breach. Their
10 entire claim is predicated on Wheeler's intent and propensity
11 to breach. He was not induced. He is alleged to have been
12 planning that from the very outset.

13 And with regard to whether or not it's a sole purpose
14 standard or some other standard, it's truly irrelevant. There
15 is no case that plaintiffs have cited to where a reporter
16 asking a source for information, even in violation of a
17 confidentiality agreement, is somehow tortious interference.
18 If that were the case, confidentiality agreements could be used
19 as a means of restricting the media's access to all sorts of
20 information, whether coming from corporations or government
21 agencies.

22 THE COURT: I read that analysis somewhere, but I am
23 not sure I completely agree with that. If it's important to my
24 business that I keep certain information confidential, I am not
25 sure that a person with impunity simply decide they want to

1 give it up to a report.

2 MR. TERRY: I agree with that absolutely. There is a
3 remedy for that. That remedy is breach of contract. And they
4 have not sued Mr. Wheeler for breach of contract. If they
5 think he breached his contract, they can sue him. The remedy
6 is not tortious interference because tortious interference,
7 even under their articulation, requires that the action be
8 without justification, and they have not cited and I'm not
9 aware of any cases finding that reporting conduct is without
10 justification.

11 With regard to the intentional interference claim, I
12 think that the plaintiffs' presentation was notable for many
13 things which you did not hear. You didn't hear any New York
14 cases permitting a claim based upon defamatory statements made
15 about another. You didn't hear any New York cases allowing
16 such a claim to proceed based upon news reports or news
17 gathering, which is what's alleged here. You also didn't hear
18 anything about an intent possessed by Fox to harm the Riches,
19 and that's important because a lot of the cases that they cite,
20 including the one that they really rely on, which is the
21 Natalee Holloway case, which is a magistrate judge opinion from
22 the Northern District of Alabama. That's their key case. It's
23 relying on Alabama law. It's not relying on *Howell* or New York
24 law.

25 And it gets around the of and concerning requirement

by saying there was a direct and intentional effort to harm the plaintiffs. It's a footnote in the case and it's critical because that is how the Court gets around the constitutional requirement of of and concerning. It says: The conduct at issue here is actionable because the defendants allegedly knew that the plaintiff would suffer great distress and allegedly intended, and the Court italicized the word intended, intended to inflict harm upon her. That's how they handled the of and concerning requirement by saying this basically is the same thing as the statement it's of and concerning the plaintiff because it was an intentional gatherer of sorts wielded.

Those facts aren't alleged here. There is no allegation that Fox intended to hurt anyone. To the contrary, as they describe it, they describe themselves as being collateral damage, not as intentional victims of misconduct. That's a direct quote from the complaint.

I think it's also notable that when you asked Mr. Gail about what the source of the damage was at the beginning of their presentation, he said, I won't say it was the publication of the article that caused the injury. Now, the reason he wouldn't say that is because if that is the basis of their claim, it's barred by the of and concerning requirement. It's also barred by *Snyder* and it's barred by New York common law.

Unfortunately for them, their complaint is replete with allegations that the damage comes from the publication

1 itself. I can point you to the particular paragraphs. But we
2 have talked about them. It's paragraphs 133, 132E, C, 118,
3 119. They say it is the publication of this information about
4 Seth Rich which is what caused the damage.

5 Now, they note there are a number of cases where
6 intentional infliction claims have been permitted or discussed
7 as possibly being amenable to proceeding based on conduct as
8 opposed to statements in the publication itself. I think a key
9 distinction with those cases are that the conduct itself was
10 alleged to have been an independent tort, and that goes back to
11 the *Onassis* cases, which is one of the critical cases they rely
12 on, which is a New York case, the only case where anything
13 approaching news gathering is held to be actionable, and it is
14 where paparazzi are chasing the Kennedy family around,
15 physically endangering them, assaulting them, and battering
16 them, which was found by the Court, and they allowed an
17 intentional infliction claim to proceed because that conduct by
18 itself was tortious.

19 That's exactly like the concurrence by Justice Breyer
20 from *Snyder* that they discussed where there is an independent
21 tort committed by itself in the action of news gathering. That
22 could be actionable. That could be actionable as assault or
23 battery or intentional infliction of emotional distress. It's
24 not a get-out-of-jail-free card just because you're a reporter.

25 What's different about that instance and the cases

1 they rely on is their independent torts without reference to
2 the publication. I would defy anyone to try and read that
3 complaint and think about how it could possibly allege an
4 injury without any reference to the publication. The injury is
5 specifically alleged to have come from the publication.

6 Imagine a world in which everything happened up until
7 the point of publication. And Malia Zimmerman said, you know
8 what, I don't want to go with this article. There would be no
9 tort. There would be no alleged damages.

10 All of their damages stem from the act of publication.
11 They don't cite a single case that comes anywhere close to the
12 activities actually alleged here. There is no case that's
13 found activity like this to be considered outrageous. When
14 they attempt to articulate what happened, it's an act of
15 deception. Your Honor had a colloquy with them about that.

16 New York courts have found that acts of deception
17 alone are not enough to state a cause of action, even when it
18 causes intention emotional distress. The *Doe* case, rape
19 victims were lied to about whether their identity would be
20 protected. They were lied to repeatedly and the Court said
21 that's not enough to state a claim for intentional infliction
22 of emotional distress.

23 There is another case where someone was lied to about
24 whether or not he would be on the air and the nature of the
25 interview, and then the tapes were edited in a misleading way,

1 in a way that made him look bad. So it wasn't just the
2 content. It was the activity. And what the Court said was,
3 you are talking about activity, but your claim stems from the
4 final broadcast because that's where the impact, the injury
5 happened to you. And because it's based on the broadcast and
6 its effect on you, that's really a defamation claim, and you
7 can't get around that by rephrasing it as a claim for
8 intentional infliction of emotional distress.

9 I have not looked for very long at the cases that the
10 plaintiffs just handed up today, but I would note in at least
11 one of them, the *Gill* case, there was an allegation, like in
12 the *Holloway* case, that something was done intentionally to
13 harm a business competitor and it was directed at them for the
14 purpose of causing that harm. There are no allegations
15 anywhere close to that in this case.

16 I would also note that the cases that the plaintiffs
17 rely on don't involve one of the critical questions here, which
18 is a communication on an issue of public concern. The New York
19 cases they rely on, like the Howard Stern case and the *Esposito*
20 case, aren't public concern cases. They are shock jocks.

21 The *Esposito* case, like in the *Holloway* case, the
22 Court relied on the fact that there was an intent to harm that
23 person and it was directed at that person for the purpose of
24 committing that harm.

25 The Howard Stern case, the facts were gruesome. The

1 person on the air was actually chewing on human remains and
2 that was found to be an intentional infliction of emotional
3 distress.

4 One thing we didn't talk about or didn't hear the
5 plaintiffs talk too much about is what the intentional
6 infliction standard actually is. It's not just outrage by
7 itself. It has got to be conduct that is utterly unacceptable
8 in civilized society.

9 I would submit that the Howard Stern case is a pretty
10 good example of where courts find that that has crossed the
11 line. The *Doe* case, even lying to rape victims about whether
12 they will be on the air, is not enough. The facts alleged in
13 this case are not nearly enough, and I think that's
14 particularly evident and I'll finish by mentioning this.

15 The plaintiffs' chart of what Ms. Zimmerman actually
16 did, if you take a look, it's handily color coded so you can
17 see exactly what different parties are alleged to have done.
18 Ms. Zimmerman is in red.

19 She is alleged to have met with Wheeler and told him
20 that she had been investigating Seth's murder for months.
21 That's January 28.

22 February 5, she e-mails Joel Rich for information to
23 bring further attention to Seth Rich's case, which was
24 certainly true.

25 January 3, 2017, she e-mails Joel and the Rich family

1 spokesman about Seth's murder.

2 April 23, she sends Wheeler numerous e-mails with
3 research about Detective Della Camera and the Metropolitan
4 Police Department's investigation of Seth Rich.

5 She sends Wheeler a draft of the article and tells
6 Joel that much of our information came from Wheeler, which I
7 thought is what we were being sued for on the tortious
8 interference claim. I am not sure how they can allege that's
9 false when they say we tortiously got information from Wheeler.
10 And she says that she admits to Wheeler that that's the e-mail
11 that Fox asked me to send to Joel.

12 None of that comes close to the type of outrageous
13 behavior that was alleged in these cases. All of that activity
14 that they say, that's news-gathering activity. That's not
15 activity that's utterly unacceptable in civilized society. It
16 doesn't come close to meeting the standard.

17 We don't need more facts or more discovery to answer
18 that question. The facts of what caused outrage, if it's truly
19 outrageous, they should know because that conduct must have
20 caused them some emotional harm.

21 The only conduct that is alleged to have caused them
22 emotional harm is the publication of that article and that's
23 protected by the First Amendment and it doesn't come close to
24 being unacceptable in civilized society.

25 THE COURT: Did you have anything?

MR. HARRISON: Two quick points.

Counsel had raised the issue of whether communications in the forum state were sufficient for jurisdiction, and we cited a number of cases in our briefing that said that it's not.

She raised today for the first time one case, Court of Appeals case from 1970. I just had an opportunity to read it. I think your Honor noted this, but I just wanted to make clear, this was a breach of contract case in which the defendant had been engaged in commercial activity by submitting bids for an auction over the phone. There was a lawsuit that resulted because that defendant failed to pay for the artwork that he was bidding on. The Court found that that commercial activity in the course of calling in those bids from a foreign jurisdiction was sufficient to confer jurisdiction in that case.

THE COURT: Thank you.

MR. HARRISON: One other point I wanted to make is that counsel also alluded to the fact that Mr. Butowsky had some control over or where the article was published. He did not. She in fact suggested that he could have orchestrated the publication of that article in D.C. or in New York. It's certainly not alleged. He certainly didn't have any sort of editorial or control over the publication. But the fact is that Fox News is based in New York. That is where it, from

what I understand, publishes online articles. The location of Fox News in that context really has nothing to do with the transaction itself.

THE COURT: Thank you.

If you want to submit something further, submit me a letter before the end of the month and then a response. The end of the month is probably the 29th of June. If you want to respond to it, do so by the 10th of July, which is after 4th of July week, so you can have some time to do that, the Tuesday after.

I am going to get the transcript. This has been helpful. I will get you a decision as early as possible this summer.

Thank you.

(Adjourned)